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No. 2166

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH JUDICIAL CIRCUIT

LEONARD OLSSON,

Respondent and Appellant,

vs.

UNITED STATES OF AMERICA,

Petitioner and Appellee,

and

CHARLES A. ENSLOW,

Intervenor and Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District
Court, for the Western District of
Washington, Southern Division

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CLERK

The Bell Press, Printers.

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Court of Appeals
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R. WINSOR, Esquire,
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Solicitors of Counsel and Attorneys for the Appel-
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W. G. McLAREN, Esquire,
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Federal Building, Seattle, Washington,
United States Attorneys.

CHARLES A. ENSLOW, Esquire,
Pioneer Building, Seattle, Washington,
(Appearing in Propria Persona.)

Praeceptum for Transcript

To the Clerk of the above entitled Court:

You will please prepare the following transcript on appeal:

U. S. v. Olesen.

Memo for transcript.

- 1.—Petition and affidavit;
 - 2.—Demurrer;
 - 2½.—Order overruling demurrer;
 - 3.—Answer;
 - 4.—Opinion of Court;
 - 5.—Decree;
 - 6.—Petition for rehearing;
 - 7.—Order overruling petition and order presented
by U. S. and overruled.
 - 8.—Papers on Appeal;
 - 9.—Petition in Intervention.
- (Filed Jul. 15, 1912).

McKAY.

Stipulation to Omit Titles, etc.

It is hereby agreed by the respective parties, as follows:

1. That the title, signature of judge, and parties, and all verifications, and certificates may be omitted from the papers and documents in this cause in making up the transcript on appeal.

2. That all titles, signatures, verifications and certificates are admitted to be regular and sufficient, in the original documents and files.

W. G. McLAREN,
U. S. Attorney.

(Filed Jul 17 1912).

J. W. A. NICHOLS,
J. H. EASTERDAY,
RICH. WINSOR,
GEO. McKAY,
Attorneys for appellant.
CHARLES A. ENSLOW,
Intervenor.

*United States Circuit Court, Western District of
Washington, Western Division.*

UNITED STATES OF AMERICA,	}	No. 1688.
vs.		
LEONARD OLSSON,		
	Respondent.	

Petition

TO THE HONORABLE JUDGES OF THE
ABOVE ENTITLED COURT:—

The petition of the United States of America respectfully represents and shows to the court:—

I.

That the above named respondent, Leonard Olsson, is now a resident of the City of Tacoma, Pierce County, State of Washington.

II.

That before the filing of this petition and the commencement of this proceeding, an affidavit was made by John Speed Smith, and presented to the United States Attorney for the Western District of Washington, showing good cause for the institution of this proceeding, which said affidavit is hereto attached and made a part hereof.

III.

That the respondent herein, Leonard Olsson, on the 10th day of January, 1910, obtained an order from the Superior Court of Pierce County, Washington, granting his petition and admitting him to become a citizen of the United States of America, which said petition was filed under the provisions of the Act of Congress of June 29, 1906; that pursuant to said order of said Court, a certificate of citizenship was issued out of said Court and delivered to the said Leonard Olsson, and that since said date the said Leonard Olsson has claimed and now claims to be a citizen of the United States.

IV.

That contrary to the provisions of said Act of Congress the said Leonard Olsson being the petitioner in the aforesaid proceeding in the said Superior Court of the State of Washington in and for said Pierce County, did, for the purpose of obtaining said certificate of citizenship, wilfully, knowingly and intentionally represent and state to the Court upon the hearing on said petition that he was attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, whereas in truth and in fact the said petitioner, Leonard Olsson, was not attached to the principles of the Constitution of the United States at the time he represented himself so to be, and was not a person well disposed to the good order and happiness of the United States, and had not been for a period of several years prior to his so testifying at said hearing; that the said petitioner, Leonard Olsson, well knew said testimony and representations to the Court to be false and in violation of law, and that the said certificate of citizenship was obtained through fraud and perjury, and thereafter did testify in said Superior Court of Pierce County, Washington, on or about the 12th day of September, 1910, as a witness in the petition of one Carl Olsen for naturalization, that he, the said respondent herein, was not then so attached to the principles of the Constitution of the United States, and had not been for a period of two or three years prior to the date of said last hearing, to-wit: September 12th, 1910.

WHEREFORE, Your petitioner prays that process issue out of this Court in accordance with the law and rules and practices of this Court, requiring the said respondent, Leonard Olsson, to be and appear in the above entitled Court on a day certain, to-wit: Sixty days after the date of service of such process upon him, exclusive of the day of service, and answer the petition of the petitioner herein, and further prays that the order of the said Superior Court of the State of Washington in and for Pierce County, made on the 10th day of January, 1910, admitting the respondent herein to be a citizen of the United States of America, be set aside and held for naught, and that the said certificate of citizenship issued out of the said Superior Court of Pierce County, Washington, on the said 10th day of January, 1910, and delivered to the respondent herein, be revoked and cancelled, and that the said Leonard Olsson be restrained and enjoined from using or enjoying the rights and privileges thereunder, and that your petitioner have such other and further relief as to this Honorable Court may seem meet and equitable.

ELMER E. TODD.

United States Attorney.

W. G. McLAREN.

Assistant United States Attorney.

STATE OF WASHINGTON,

County of King. ss.

JNO. SPEED SMITH, being first duly sworn according to law deposes and says; that he

is now and has been for more than two years last past a duly appointed and acting Chief Naturalization Examiner of the United States for the District of Washington, with headquarters at Seattle, Washington; that the records of the Superior Court of Pierce County, Washington, at Tacoma, show that Leonard Olsson filed petition for naturalization No. 517 in said Court on the 27th day of September, 1909, and was admitted to become a citizen of the United States by said Court, January 10, 1910, and a certificate of naturalization, No. 117750 issued to him; that said petitioner made oath in said petition for naturalization, No. 517 as follows: "I am attached to the principles of the constitution of the United States;" that said Leonard Olsson appeared as a witness for petitioner for naturalization, Carl Olsen, in said Superior Court of Pierce County, Washington, September 12, 1910, and under oath, said Leonard Olsson as such witness for Carl Olsen, stated in open Court in answer to interrogatories propounded by affiant that he, the said Leonard Olsson, was not attached to the principles of the constitution of the United States; that he believed in radically changing it; that he had maintained such view for a period of between two and three years and at the time he, the said Leonard Olsson, was admitted to become a citizen of the United States he was not attached to the principles of the constitution of the United States, therefore, affiant believes that the said Leonard Olsson was not a fit subject, at the time of his naturalization, to be-

come a citizen of the United States and was not naturalized in accordance with law.

JNO. SPEED SMITH.

Subscribed and sworn to before me this 21st day of September, 1910.

R. M. HOPKINS.

Clerk U. S. Dist. Court, Western Dist. of Washington.

(SEAL OF THE)

(DISTRICT)

(COURT.)

(Filed Oct. 27, 1910.)

Demurrer

Comes now the Respondent in the above entitled matter and demurs to the petition herein and to the affidavit upon which the same is based, upon the ground and for the reason that it appears upon the face thereof that the same do not state facts sufficient to constitute a cause of action against this respondent.

J. W. A. NICHOLS.

Attorney for Respondent.

506-7 Bank of California Bldg., Tacoma, Washington.

Received copy, this 1st day of December, 1910.

CHAS. T. HUTSON.

Asst. U. S. Attorney.

(The following pencil notations in the handwriting of Judge Donworth) :

"Nichols cites:—

U. S. v. Ackerbik, 180 Fed. 137.

McLaren cites:—

Exparte Sauer, 81 Fed 355.

U. S. v. Nesbit, 168 Fed. 1005.”

(Filed Nov. 30, 1910.)

Order Overruling Demurrer

This cause coming on regularly for hearing upon the demurrer of the defendant to the petition filed herein, and said demurrer having been argued by counsel, upon consideration thereof,

IT IS NOW ORDERED BY THE COURT that said demurrer be and the same is hereby overruled, and the defendant is granted ten days in which to file his answer herein.

Dated this 3rd day of April, A. D. 1911.

GEORGE DONWORTH, Judge.

(Filed Apr. 3, 1911.)

Answer

Comes now Leonard Olsson, Defendant in the above entitled cause, and for his answer to the petition therein alleges:

I.

Defendant admits the statements of paragraph I.,

II.

Answering paragraph II., of said petition defendant denies that said affidavit shows good cause or any cause for this proceeding.

III.

Admits the allegations of paragraph III.

IV.

Admits the allegations of the first part of paragraph IV., to-wit: down to and including the word "same," in the 16th line thereof, excepting that defendant alleges that said proceedings were done in harmony with the provisions of the said Act of Congress, and not contrary thereto. And from and including the word "whereas," in said 16th line defendant denies all the remainder of said paragraph and every allegation thereof.

Wherefore defendant prays that this proceeding be dismissed and that he have an order for the return of his costs expended herein.

J. W. A. NICHOLS.

Attorney for Defendant.

(Filed Apr. 11, 1911.)

Opinion on Merits

Suit in equity for annulment of naturalization of an alien. On final hearing. Decree for the United States.

W. G. McLaren, Assistant United States Attorney.

J. W. A. Nichols, For Respondent.

HANFORD, District Judge:—

This suit is prosecuted by the United States District Attorney for this District, pursuant to the 15th Section of the Naturalization law of June 29, 1906, 34 U. S. Stat. 596; U. S. Compiled Laws Supp. 1907, p. 419; F. S. A. Supp. 1909, p. 365; Pierce's Fed. Code Sec. 8292; to obtain a decree setting aside and cancelling a certificate of naturalization alleged to

have been fraudulently obtained by the respondent. The grounds for the suit as set forth in the government's petition, are that the respondent on the 10th day of January, 1910, obtained an order from the Superior Court of Pierce County, Washington, admitting him to become a citizen of the United States of America, and that a certificate of citizenship was issued out of said court and delivered to him, and that since said date he has claimed and now claims to be a citizen of the United States; that for the purpose of obtaining said certificate of citizenship the respondent intentionally represented to the Court on the hearing of his application that: "He was attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Those averments and the jurisdictional facts set forth in the petition, are admitted by the respondent's answer; he makes an issue, however, by denying, the charge contained in the petition, that the representations which he made to the Court respecting his attitude toward the Constitution and government of the United States, were and are contrary to the truth.

On the trial of the case the respondent appeared in person and by an attorney and after the introduction of evidence on the part of the government tending to prove that, he is now and was at and previous to the time of being admitted to be a citizen of the United States, opposed to the form of government of this country and to the principles of the Constitution, he offered rebutting evidence and gave

testimony in his own behalf, which in the opinion of the Court materially aided the government's case. Answering direct interrogatories propounded by his own attorney he denied that he is an anarchist; denied that he is opposed to organized government and denied that he is in favor of overthrowing this government by force or violence, but omitted to make any declaration affirming his loyalty to the Constitution of the United States, and on the contrary, when tested by cross-examination, his answers to all questions respecting his attachment to the Constitution of the United States were evasive. He admitted that he is a socialist and frequenter of assemblages of socialists in which he participates as a speaker advocating a propaganda for radical changes in the institutions of the country. He claimed to have a clear understanding of the Constitution of the United States and knew that by one of its articles deprivation of life, liberty or property without due process of law, is forbidden and yet the evidence introduced in his behalf proved that the party with which he is affiliated and whose principles he advocates, has for its main object the complete elimination of property rights in this country. He expressed himself as being willing for people to retain their money, but insisting that all the land, buildings and industrial institutions should become the common property of all the people, which object is to be attained, according to his belief, by use of the power of the ballot, and when that object shall have been attained the political government of the

country will be entirely abrogated, because, there will be no use for it. And he further admitted that his beliefs on these subjects were entertained by him at and previous to the date of the proceedings in the Superior Court admitting him to become a citizen of the United States.

In order to procure a certificate of naturalization, the respondent was required to comply with the provisions of the Statute above cited, which is mandatory and stringent in prescribing the necessary qualifications of aliens to become citizens of the United States, and in limiting the power of the Courts in naturalization proceedings. The 4th Section of the Act requires, among other things, that each applicant shall make and file a petition in writing setting forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in, or opposed to organized government; and that he shall before he is admitted to citizenship, declare on oath in open court that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same; and provides further that it shall be made to appear to the satisfaction of the Court admitting an alien to citizenship, that he is, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. The 7th Section of the Act provides:—

“That no person who disbelieves in, or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in, or opposition to organized government, * * * shall be naturalized or be made a citizen of the United States.”

The 15th Section makes it the duty of United States District Attorneys upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured; and provides further that the Court shall make an order cancelling any certificate of citizenship fraudulently or illegally procured. The 23rd. Section provides:—

“That any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined not more than \$5,000, or shall be imprisoned not more than five years, or both, and upon conviction the Court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship, void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.”

The people of this country ordained the Constitution of the United States, to form a more perfect

Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, and thereby established a national government, to endure permanently. The notion that citizens of this country may absolve themselves from allegiance to the Constitution of the United States, otherwise than by expatriation, is a dangerous heresy. The nation generously and cordially admits to its citizenship aliens having the qualifications prescribed by law, but recognizing the principle of natural law, called the law of self-preservation, it restricts the privilege of becoming naturalized to those whose sentiments are compatible with genuine allegiance to the existing government as defined by the oath which they are required to take. Those who believe in and propagate crude theories hostile to the Constitution are barred.

The evidence in this case including the respondent's admissions above recited do not have to be analyzed, interpreted or weighed in order to determine any doubtful question as to his attitude. He has no reverence for the Constitution of the United States, nor intention to support and defend it against its enemies and he is not well disposed toward the peace and tranquillity of the people. His propaganda is to create turmoil and to end in chaos. But in order to secure a certificate of naturalization he intentionally made representations to the Court which necessarily deceived the Court,

or his application for naturalization would have been denied. Therefore, by the petition which he was required to file and his testimony at the final hearing of his application and by taking the oath which was administered to him in open Court, he perpetrated a fraud upon the United States and committed an offense for which he may be punished as provided by law. The case, therefore, comes clearly within the provisions of the law requiring the Court to set aside and cancel his certificate of naturalization and it will be so decreed.

C. H. HANFORD,

United States District Judge.

(Filed May 11, 1912.)

Decree

This matter came regularly on for hearing upon the petition of the United States of America, seeking to vacate and set aside the order of the Superior Court of the State of Washington in and for Pierce County, made on the 10th day of January, 1910, admitting the respondent herein, Leonard Olsson to become a citizen of the United States of America, and to revoke and cancel the certificate of citizenship issued out of said Superior Court of Pierce County, Washington, to the respondent herein, the petitioner appearing by W. G. McLaren, United States Attorney for said district, and the respondent, Leonard Olsson appearing in person and by J. W. A. Nichols, his attorney, and the Court having heard the evidence submitted by the respective par-

ties, and the argument of counsel herein, it appearing to the Court that the said respondent was naturalized by an order of the Superior Court of the State of Washington, in and for Pierce County, on the 10th. day of January, 1910, and that said certificate of citizenship issued out of said Superior Court and delivered to said respondent was illegally and fraudulently procured by him, in this, that the said respondent at the time of making application for his said naturalization papers, and at the time of receiving the same from said Superior Court, represented himself to be attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; whereas said respondent was not so attached and so disposed as he represented himself to be, and is not now attached to the principles of the Constitution of the United States, or well disposed to the good order and happiness of the same; and it appearing to the Court that good cause exists why the order of said Superior Court granting said certificate of citizenship be vacated and set aside;

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED, That the order of the Superior Court of the State of Washington, in and for Pierce County, made on the 10th. day of January, 1910, admitting the respondent herein, Leonard Olsson to become a citizen of the United States of America, be and the same hereby is set aside and vacated, and the certificate of citizenship issued out of said court and delivered to said respondent be and the same hereby is revoked and cancelled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That said respondent, Leonard Olsson, be, and he hereby is required to deliver up said certificate of citizenship to the Chief Naturalization Examiner of the District of Washington, Oregon, Idaho and Montana, at Seattle, Washington, or to the Clerk of this Court.

IT IS FURTHER ORDERED, That the Clerk of this Court send a certified copy of this judgment to the Bureau of Immigration and Naturalization, at Washington, D. C., and a copy to the clerk of the Superior Court of Pierce County, at Tacoma, Washington.

Done in open Court this 22nd day of May, 1912.

C. H. HANFORD, Judge,

(Filed May 22, 1912).

Petition for New Trial and Rehearing

The above respondent asks that the judgment or decree heretofore entered in this *caise* be set aside, and the cause dismissed, or if not dismissed that the respondent be granted a re-hearing and a new trial for the following reasons, to-wit:

I.

There was no evidence produced on the trial of said cause that the respondent was an anarchist or a polygamist or that he was a disbeliever in, or was opposed to organized government or a member of, or affiliated with, any organization or body of persons teaching disbelief in organized government, or that he is not or was not attached to the principles

of the Constitution of the United States and well disposed to the good order and happiness of the same.

II.

The evidence produced on the trial of said cause that the respondent is and was a Socialist and a member of the Socialist Labor Party, does not prove that he is an anarchist or that he is opposed to organized government for the reason that Socialists, including the respondent, believe in a highly organized form of government, not in the abolition or destruction of government, nor do Socialists teach or believe in the change of constitutions or forms of government by force; the testimony showed and the respondent reaffirms that he is now and at all times has been in favor of organized government and that his purpose is and was to support the Constitution and laws of the United States.

III.

That Socialists do not believe in or teach, nor does the respondent believe, that any man's life, liberty or property should be taken without due process of law. They teach and believe and the respondent believes that the instrumentalities of production should be owned collectively and that exploitation of the laborer should cease, and that he should receive the full product of his labor. But Socialists do not teach and the respondent does not believe that those instrumentalities of production can be acquired except by due process of law.

IV.

That no evidence was produced on the trial of this

cause that the respondent is not or was not attached to the principles of the Constitution of the United States. Proof that he is and was in favor of changes in that Constitution does not disprove his devotion to the Constitution, for the Constitution itself provides for its amendment, and even radical changes and amendments are entirely within the constitutional right of the people, and it is the political right of every citizen to advocate such changes, even though such advocacy may create political disquiet. The "peace" which the Constitution was designed to secure was not the peace which prevails where political discussion is absent.

V.

That on the trial of this action no record was made or kept of the testimony; and no statement of a case embodying the testimony, or bill of exceptions can be settled, except on the memory of counsel and the court as to the testimony, which might involve counsel for the respondent in an unseemly controversy with the court as to such testimony.

VI.

The Court erred in its opinion in this action in the following particulars:

1. In holding that on the trial the respondent was required "to make any declaration affirming his loyalty to the Constitution of the United States."

2. In holding that "his answers to all questions respecting his attachment to the Constitution of the United States were evasive." His answers were not evasive, but if they were that such evasiveness was

no ground for setting aside and annulling his naturalization.

3. In holding that it is a legal ground for annulling his naturalization because "he is a Socialist and a frequenter of assemblages of Socialists in which he participates as a speaker advocating a propaganda for radical changes in the institutions of the country."

4. In holding that the Socialist party or organization "has for its object the complete elimination of property rights in this country."

There was no proof that it ever was or now is the purpose of the respondent or any organization or party to which he belongs to eliminate property rights in this country, or detract in any degree from the sacredness of property rights. The Socialist believes in the sacredness of private property.

5. In holding that it is ground for annulling the respondent's naturalization because he believes that an industrial organization of the State and Nation should displace the present political organization. Every citizen worthy of the name is seeking by some means or in some way to change the political government of this country. An industrial organization of the government would be a beneficial change.

6. In holding that it was the purpose of the people of the United States, in adopting the Constitution, to "establish a national government to endure permanently," The people who adopted the Constitution made a clear distinction between the people or the Nation on the one hand and the government

on the other; the Nation or the people was the principal, the government a mere agency of the people; they believed that all governments derive "their just power from the consent of the governed," and that "it is the right of the people to alter or abolish it (the government), and to institute new government, laying its foundation on such principles, and organizing its powers on such form, as to them shall seem most likely to effect their safety and happiness." The only permanent and enduring principle recognized in the Constitution, is the right of the people to govern themselves and to make and unmake constitutions and forms of government, and it is a dangerous heresy to hold that any part of the Constitution is beyond the power of the people to annul or repeal.

7. In holding that the United States has restricted "the privilege of becoming naturalized to those whose sentiments are compatible with genuine allegiance to the existing government." The restrictions on naturalization are well defined by law and the applicant for naturalization is not required to possess a sentiment of devotion "to the existing government." Such a doctrine would compel him to refrain from an agitation for the most necessary amendment. Such a doctrine would have compelled every naturalized citizen to oppose the fifteen amendments to the Constitution, one of which (the fourteenth) was cited and emphasized by the court.

8. In holding that "those who believe in and propagate crude theories hostile to the Constitution

are barred" from naturalization. The law defines the only crude theories which shall bar a foreigner from naturalization; they are opposition to organized government. Besides who is to be the judge whether the theories are crude or hostile to the Constitution? Again is a wish to change some provision of the Constitution hostility to the Constitution?

9. In holding that it was necessary to his naturalization that the respondent should have a "reverence for the Constitution of the United States."

No such restriction is written into, or implied in, the law. Such reverence is incompatible with the critical spirit necessary to the securing of much needed changes in that instrument.

10. In holding that it was necessary to his naturalization that he have an "intention to support and defend it (the Constitution) against its enemies." No such restriction exists by law and the Court possesses no power to add one word to the written law on the subject. One who merely believes in changing the Constitution is not its enemy; if so the Constitution has more enemies than friends.

11. In holding that "he is not well disposed toward the peace and tranquility of the people. His propaganda is to create turmoil and to end in chaos."

This imposed on the respondent an extra legal condition and required of him, by the decree, what the law does not require. The judgment of the court should be the voice of the law.

12. In eliciting and considering over the objection of respondent's counsel and rendering judg-

ment upon evidence upon irrelevant and immaterial matters, viz: the political beliefs and doctrines of the respondent when the only issue was the question of fraud in obtaining his naturalization certificate.

This application is based on the records and files in this action and on this petition.

LEONARD OLSSON, Petitioner.

(Filed Jun. 8, 1912.)

Order Denying Motion and Petition to Vacate Judgment

This matter coming on for hearing in open Court on the 19th day of June, 1912, before C. H. Hanford, Judge of the above entitled court, on the petition of the defendant, and motion of plaintiff, each asking that the judgment heretofore entered by this court on the 22nd day of May, 1912, be vacated and set aside and a new trial had of said cause, plaintiff appearing by the United States Attorney, and the defendant appearing by J. W. A. Nichols, George McKay and R. Winsor, and J. H. Easterday, his attorneys, and the court being in all things fully advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That said petition of the defendant, and said motion of the plaintiff, and each of them, be and they are hereby denied;

To which ruling of the court the plaintiff and defendant then and there duly except, which exception is hereby allowed.

Done in open court this 19th day of June, 1912.

(Filed Jun. 19, 1912) C. H. HANFORD, Judge

Petition in Intervention

Comes now Charles A. Enslow, and represents to the Court that he is a citizen of the United States over twenty-one years of age, that he is a party in interest in the above entitled cause, in that he has a vested interest in the same as a citizen of the United States, entitled to all the rights, privileges and immunities of a citizen, and that his said interests are jeopardized by certain acts done or threatened to be done in connection with this cause, that *the* his interests are such as are properly cognizable by and within the jurisdiction of this Court, and that he has no other remedy at law or in equity.

WHEREFORE, he prays the order of the Court joining him as a party plaintiff in the above entitled cause.

CHARLES A. ENSLOW.

In Propria Persona.

(Filed Jun. 19, 1912).

Petition for Appeal and Order Allowing Same

The above named Respondent and Appellant, Leonard Olsson, conceiving himself aggrieved by the decree of said court entered on the 22nd day of May, 1912, in the above entitled court, and by the order of said court denying his petition for a rehearing, hereby appeals from said decree and said order to the United States Circuit Court of Appeals of the Ninth Circuit and prays that this his appeal be allowed and that a transcript of the record proceedings and papers upon which said decree was made,

properly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

J. W. A. NICHOLS.

J. H. EASTERDAY.

GEO. McKAY.

R. WINSOR.

Solicitors, of counsel, and attorneys for the appellant.

On reading the foregoing petition and also the assignments of error herewith presented, and after due consideration thereof,

IT IS ORDERED, that the said appeal be allowed as prayed for and that the penalty of the bond on appeal is hereby fixed at the sum of Two Hundred (\$200.00) Dollars.

Dated this 15th day of July, 1912.

C. H. HANFORD, Judge.

(Filed Jul. 15, 1912).

Assignments of Error

The above named respondent and appellant, Leonard Olsson, by his counsel says that in the record and proceedings in said cause there is manifest error in this to-wit:

1. The said court erred in overruling the appellant's demurrer to the petition.

2. The said court erred in proceeding to hear the testimony orally in open Court without a previous order, and without notice as provided by the 67th Equity rule.

3. The said court erred in not taking down and reducing to a record or to a written form the testimony of the witnesses and the rulings of the court on the admissions of such testimony and the testimony rejected by the court.

4. The said court erred in pronouncing a decree without first reducing to writing the testimony taken and rejected in said cause.

5. The said court erred in pronouncing the said decree; the evidence did not sustain the said decree.

6. That said Court erred in holding that the appellant secured his naturalization by fraud; there was no evidence to sustain such a finding.

7. That said court erred in overruling the appellant's petition for rehearing, concurred in by the above named petitioner and appellee.

WHEREFORE, the above named Appellant prays that this his assignments of error be entered in the records of this cause, and that upon the hearing of this appeal the said decree be in all things vacated, reversed and set aside, and the said cause dismissed

J. W. A. NICHOLS.

J. H. EASTERDAY.

GEO. McKAY.

R. WINSOR.

Solicitors, of counsel, and attorneys for the appellant.

Dated this 15th day of July, 1912.

(Filed Jul. 15, 1912)

Bond on Appeal

KNOW ALL MEN BY THESE PRESENTS:— That we, Leonard Olsson as principal, and C. H. Jellsett, (a single man), Geo. W. Scott (a single man), J. E. Riordan and Mary W. Riordan, his wife, all of King County, Washington, as sureties, are jointly and severally held and firmly bound unto the United States of America, the above named petitioner, and to Charles A. Enslow, the above named intervenor, in the sum of Two hundred (\$200.00) Dollars for the payment of which well and truly to be made we bind ourselves, our heirs, representatives and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of July, 1912.

WHEREAS, the above bounden principal has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above entitled cause on the 22nd day of May, 1912, and from the order denying a rehearing of said cause,

NOW THEREFORE, if the said principal shall prosecute his said appeal to effect and answer all costs if he shall fail so to do, then this obligation

shall be void, otherwise to remain in full force and effect.

LEONARD OLSSON.

By Geo. McKay, his attorney.

C. H. JELLSETT (Single).

GEO. W. SCOTT (Single).

J. E. RIORDAN.

MARY W. RIORDAN, his wife.

The foregoing bond approved by me as to form, amount and sufficiency of sureties this 15th day of July, 1912.

C. H. HANFORD, Judge.

(Filed Jul. 15, 1912)

Certificate

UNITED STATES OF AMERICA, }
WESTERN } ss.
DISTRICT OF WASHINGTON. }

I, A. W. ENGLE, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing pages contain a full, true and correct transcript of the record in case No. 1688-C of this Court wherein the United States of America is petitioner and appellee, and Charles A. Enslow, is intervenor and appellee, and Leonard Olsson, is the appellant and respondent, as required by the stipulation of counsel filed in said cause, as the original thereof appear on file in said court at the City of Tacoma, in said District.

And I do further certify that the clerk's fees for preparing, certifying and printing said record on appeal, amounting to \$49.10, has been paid in full to me by the solicitors for the appellant.

ATTEST my official signature and the seal of the said Court, at Tacoma, in said District, this 27th day of July, A. D. 1912.

A. W. ENGLE, Clerk.

By

R M Jamieson
Deputy Clerk.

United States Circuit Court Of Appeals

FOR THE NINTH CIRCUIT

LEONARD OLSSON,

Respondent and Appellant,

vs.

UNITED STATES OF AMERICA,

Petitioner and Appellee,

and

CHARLES A. ENSLOW,

Intervenor and Appellee.

Brief for Appellant

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

FILED

DEC 30 1912

GEO. McKAY

J. A. W. NICHOLS

R. WINSOR

J. H. EASTERDAY

Attorneys for Appellant

United States Circuit Court Of Appeals

FOR THE NINTH CIRCUIT

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Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

GEO. McKAY

J. A. W. NICHOLS

R. WINSOR

J. H. EASTERDAY

Attorneys for Appellant

I.

STATEMENT OF THE CASE.

This action was brought in the court below under Sec. 15 of the Naturalization Act of 1906 (34 U. S. Stat. 596, F. S. A. Supp. 1909, p. 356). The act provides (Sec. 15) "That it shall be the duty of the United States District Attorney, for the respective districts, *upon affidavit showing good cause therefor* (Italics ours) to institute proceedings * * * for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured."

In this case the affidavit required by the statute, which we will call the initiatory affidavit, was made by John Speed Smith. In this affidavit, omitting formal parts, it is stated as grounds for bringing action to cancel, that in the appellant's application for citizenship he stated (1) that "I am attached to the principles of the constitution of the United States," and (2) that afterwards, in the application of another for naturalization, the appellant, as a witness, swore that he "was not attached to the principles of the constitution of the United States"; that he "believed in radically changing it," and that he held the latter opinion at the time of his own naturalization. (Printed Trans. p. 7).

Fairly construed this affidavit amounts to nothing except a charge that the appellant believed in radical changes in the constitution, without specifying any change in which he believed.

A demurrer was interposed and overruled. (Trans. pp. 8 and 9).

The case was heard on oral testimony given in open court, without any minutes or record of the testimony, and without any means of reproducing the testimony except from the mere memory of the witnesses who heard it.

On the 22nd day of May, 1912, the court entered a decree cancelling the appellant's certificate of naturalization.

On the 8th day of June, 1912, the appellant filed a petition for rehearing, alleging, among other things, "That on the trial of this action no record was made or kept of the testimony; and no statement of a case embodying the testimony, or bill of exceptions can be settled, except on the memory of counsel and the Court as to the testimony which might involve Counsel for the respondent in an unseemly controversy with the court as to such testimony." (Trans. p. 20-V).

While the United States did not formally join in the petition for a rehearing, it asked the court to set aside the decree, (Trans. p. 24, see the recital in the order denying motion to vacate judgment), but, notwithstanding, the court overruled the petition of the appellant, and the request of the government.

QUESTIONS INVOLVED.

The questions involved in this appeal may be summarized as follows:

1. *The sufficiency of the petition.* We contend that the petition which includes the initiatory affidavit does not show any grounds for cancelling the appellant's certificate of naturalization. This question was raised by demurrer and is also involved in the decree, and is covered by assignment of error

No. 1. (Trans. p. 26). This question is argued in paragraph II of this brief.

2. *The failure of the court below to reduce to a record the oral testimony heard on the trial.* This failure of the court deprives us of what we are entitled by law to have, viz: a trial *de novo* here. Without the testimony this court does not have before it the same case that was presented below. This question was expressly urged upon the court below by appellant's petition for a rehearing, and is covered by assignment of error Nos. 2, 3 and 4, Trans. pp. 26 and 27. This question is argued in paragraph III of this brief.

3. *The refusal of the court below to grant a rehearing requested by both parties.* This question is raised by assignments of error No. 7, Trans. p. 27, and is argued in paragraph IV. of this brief, and is involved in the argument made in other paragraphs.

II.

THE PETITION IS INSUFFICIENT.

1. The petition must allege either fraud or illegality in procuring naturalization (Sec. 15). This petition attempts to allege fraud and states(1) that in his application for naturalization the applicant stated, as required by law (Sec. 27 form of application for naturalization) that "he is attached to the principles of the constitution of the United States," and (2) that he was not so attached because "he believed in radically changing" the constitution. Stripped of all its verbiage the petition means this and this only. The proceeding is based on the initiatory affidavit, and the initiatory affidavit was

incorporated into the petition, and nothing is alleged in the initiatory affidavit except his belief in certain radical changes, neither named or specified. The general statement in the initiatory affidavit, that he was "not attached to the principles of the constitution," is reduced to, and limited by, the clause immediately following, viz: "That he believed in radically changing it." In other words, "he believed in radically changing it," is the only substantive fact alleged, and the statement that "he was not attached to the principles of the constitution," is a pure conclusion; or it is a general allegation which is reduced to, and limited by, the clause immediately following viz: "That he believed in radically changing it." In other words, "he believed in radically changing it" is the only substantive fact alleged, and the statement that "he was not attached to the principles of the constitution," is a pure conclusion or it is a general allegation which is reduced to the particular allegation following, just as any pleading is limited by a bill of particulars. This was the interpretation put upon this petition throughout the case, as is made clear by the court's opinion. The entire burden of that opinion is contained in the changes to be produced in our institutions by the enactment into law of the measures advocated by the appellant.

The charge of want of attachment to the *principles* of the constitution, at the time of his naturalization is too vague and uncertain to present any issue. What are the principles of the constitution? One thing is clear: The *provisions* are not the *principles*, of the constitution. The appellant does not, in effect, swear that he is attached to the various clauses or provisions of the constitution. He could not

swear that he is attached to the contract clause, or the commerce clause, or the due process clause, without understanding them; and as to understanding them, the most profound constitutional lawyer in the country might well hesitate at taking an oath that he either understands or is attached to some of the interpretations put upon these clauses by the courts. The Dartmouth College Case was decided under the contract clause, and as profound a lawyer as Chief Justice Doe of New Hampshire holds that the Supreme Court of the United States had no jurisdiction to pronounce any judgment in that case for the reason that no federal question was involved. (Harvard Law Rev. Vol. 6, p. 161 and p. 213). In view of such disputes, how is the alien layman to be sure of the meaning of these provisions, and till he thoroughly understands their meaning, how silly to require him to swear attachment to them.

Again, the men who are daily applying for naturalization and swearing that they "are attached to the principles of the constitution," are laymen, not lawyers; and this conception of attachment must be something that appeals to them, and to the *heart*, not the *intellect*. The attachment is not to this or that *provision* of the constitution nor to all combined, nor to the permanency of the constitution for it provides for changes, and even radical changes may be made; but the attachment required is simply "love for his adopted country," and this love, this attachment, is not inconsistent with even the most iconoclastic spirit. Love for the temple is not inconsistent with the spirit that drives out the money changers.

In connection with this provision requiring the

applicant to swear to his attachment "to the principles of the constitution," should be noticed the oath required of the applicant (3rd sub. div. Sec. 5). He is required to swear "that he will support and defend the constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." What do these words mean? What is it to defend the constitution and laws? Who are "the enemies foreign and domestic," of the constitution and laws of the United States? Constitutions and laws do not have enemies foreign or domestic in any accurate sense, and these words are used in this statute in an accurate though a figurative sense. In a monarchical form of government, a *man* is the center of the national idea; for a government of men we have substituted a government of laws, and in our oath of allegiance the fidelity to the constitution and laws—to the country—takes the place of the oath of fidelity to a *man*, and the enemies of the constitution and laws are enemies in war. For "constitution and laws" read "country" and the real meaning of the oath at once appears.

To believe in changing the constitution is not a wrong against the United States; is no ground for refusing naturalization; and the appellant's statement that he is attached to the constitution and laws is not negatived by his admission that he is in favor of radical changes in the constitution. In brief it is no fraud upon the nation to believe in changing its constitution. And this is true even though some courts have refused to naturalize Socialists. When a Socialist is once naturalized his certificate cannot

be cancelled except for the reasons stated in the statute.

2. The appellant's certificate of naturalization was cancelled, as appears by the court's opinion, because he did not have as high a regard for the Fourteenth Amendment as the court thought he ought to have possessed. Yet nowhere was it alleged that the petitioner did not believe in this or any other amendment, or in any other clause or provision of the constitution. If the trial was to be an examination into his attachment to certain provisions or clauses they should have been specified.

We submit the petition is insufficient in both form and substance.

III.

THE COURT BELOW SHOULD HAVE REDUCED THE TESTIMONY TO A RECORD, SO THAT ON THE HEARING, ON APPEAL, THIS COURT WOULD HAVE BEFORE IT THE SAME CASE THAT WAS SUBMITTED TO THE COURT BELOW.

1. This proceeding is equitable in character, and the hearing on appeal is a trial *de novo*. In support of our contention that this proceeding is equitable in character we submit the following:

(a) Prior to this statute the jurisdiction in equity to cancel a certificate of naturalization was recognized. Such action is necessarily of an equitable character.

U. S. vs. Norsch, 42 Fed. 418.

U. S. vs. Gleason, 90 Fed. 778.

(b) Some difficulties had arisen in the exercise of this equitable jurisdiction, due to the inability of one court to review the testimony given in another court. (See cases last cited). To enable the court before which the suit to cancel is brought to inquire fully into the means used and the testimony given in obtaining the certificate, this statute was passed, not creating a new cause of action but removing the trammels to a free inquiry. Before this statute the jurisdiction was in equity; and since the statute, the action is equitable in character, though the procedure is modified, and the range of the inquiry enlarged.

(c) That this proceeding is equitable in character was recognized by the court below. In the caption to its opinion it is called a "suit in equity for annulment of naturalization of an alien." (Trans. p. 10), and its decree follows the equity form. Besides it was not regarded as an action at law for no findings of fact were made.

(d) Appeal instead of writ of error is the proper method to obtain a review. (*Johannessen vs. United States*, 225 U. S. 227, 32 Sup. ct. Rep. 613), which is evidence of its equitable character, and the Supreme Court of the United States, in that case, calls the court's final action a "decree."

That the procedure is equitable in character entitles the appellant to a trial *de novo* in this court.

Blease vs. Garlington, 92 U. S. 1-7.

Meas vs. Lockhart, 94 Fed. 274 (8th ct.).

New Orleans vs. United States, 5 Pet. 450.

Conn. vs. Penn., 5 Wheat 424.

2. The only importance in classifying this proceeding as equitable in character is to show that, in

this court, on appeal, the trial is *de novo*, which necessarily implies the necessity of this court having before it the testimony upon which the court below acted.

In other forms of action and proceeding, where the hearing upon appeal is *de novo* the necessity of having the testimony on appeal is recognized. An admiralty appeal is an instance. Without the testimony there could be no hearing *de novo* as to issues raised by the pleadings.

The bankruptcy practice furnishes another instance. *In re De Gottardi*, 114 Fed. 328, see page 345, where the court after a lengthy consideration of the question concludes, "First, that in a proceeding before a referee, such as the present one, a record should be made of all that transpires on the examination of witnesses—questions, objections, rulings, exceptions and answers should all be taken down; Second, that on a review of the order made by a referee the judge should look through the whole record."

3. In an equitable proceeding the hearing on appeal is a trial *de novo*, and without the testimony on the disputed points, there can be no trial *de novo*.

New Orleans vs. U. S., 5 Pet. 450.

Conn. vs. Penn., 5 Wheat. 424.

Blease vs. Garlington, 92 U. S. 1-7.

Meas vs. Lockhart, 94 Fed. 274.

In *Conn. vs. Penn.*, *supra*, it was held that a decree based in part on oral testimony must be reversed unless the testimony be reduced to writing and sent up.

New Orleans vs. United States, *supra*, is very important in its bearing on this case. It was heard

in part on oral testimony taken in open court but not reduced to writing and the court below "gave a statement of his recollection of the facts." "Upon inspecting the record, the court, upon the principles laid down in *Conn. vs. Penn.*, 5 Wheat. 424, ordered the decree to be reversed.

In the case of *Conn. vs. Penn.*, the court held that, 'in appeals from the circuit courts in chancery cases, the parol testimony which is heard at the trial in the circuit court ought to appear in the record.' "

In *Blease vs. Garlington*, *supra*, the Supreme Court after reviewing the practice at length in reference to chancery appeals, and the necessity of reducing to a record parol testimony taken in open court, says, "the testimony presented in that form (orally) must be taken down or its substance stated in writing and made a part of the record, or it will be entirely disregarded here on appeal." There is one expression in the opinion in this case which if not read in connection with other parts of the opinion may mislead. It is this: "We might, therefore, affirm the decree below, because there is no testimony in support of the defense." It should be noted that the plaintiff's case was made out by the bill which was confessed by the answer, and that the only oral testimony offered was by the defendant in support of a charge of fraud in obtaining the note and mortgage set up in the bill. With these facts in mind it becomes plain that the language quoted above means that "we might therefore, affirm the decree below (which is supported by the allegations of the bill admitted by the answer) because there is no testimony," to support a decree in favor of the defendant. This shows the necessity

of evidence in support of the decree on appeal. And in *Meas vs. Lockhart*, *supra*, the Circuit Court of Appeal of the Eighth Circuit says, "On appeal from a decree in equity the record must show some evidence to sustain the findings, otherwise the decree will be reversed." This was said of a case where the testimony was held to be improperly taken.

The foregoing cases teach the doctrine (1) that when an appeal is taken in an equity case, the entire case (on the pleadings as well as the evidence), is heard in the Appellate Court, and (2) that the party who finds himself in the Appellate Court without the evidence to sustain the decree in his favor is in the same fix as though he had no proof in the Court below.

The testimony in this case was taken in open court without any previous order, and was not taken down by a stenographer, nor was any record made of the testimony. Nothing like even a complete memorandum of the testimony was preserved by any one. Instead of a record of the *testimony*, which in case of this character is just as necessary as the pleadings, we have nothing but the unrecorded recollections of what was said by the witness.

4. *There is no authority by statute or recognized practice, for the reduction to a record after decree, of testimony taken orally in open court, in such a case as this.*

Under the Judiciary Act of 1789, the court might make a statement of the case embodying the oral testimony; but this power of the court was taken away by the act of 1803.

Conn. vs. Penn., 5 Wheat. 424.

New Orleans vs. United States, 5 Pet. 450.

Blease vs. Garlington, 92 U. S. 1.

And in *New Orleans vs. United States, supra*, the judge's "statement of his recollection of the facts" was disregarded as of no force or effect whatever. The judge's "statement of his recollection of the facts" is the only record we can obtain in the case at bar, and such a statement should be disregarded.

"The testimony presented in that form (orally) must be taken down, or its substance stated in writing and made a part of the record," and evidently this must be done on the trial (*Blease vs. Garlington*, 92 U. S. 1.), or the testimony would be nothing but the judge's "statement of his recollection of the facts" which was disregarded in *New Orleans vs. United States, supra*.

The testimony cannot be embodied in a bill of exceptions, "because bills of exception are unknown to the practice of the court" of chancery. (*Southern B. & L. Assoc. vs. Carey*, 117 Fed. pp. 329 and 333).

The practice in the Court of Chancery contemplates a complete case on the hearing. This complete case is made up of the pleadings *and* the testimony in the form of depositions.

(*Southern B. & L. Assoc. vs. Carey*, 117 Fed. p. 334.)

IV.

THE COURT BELOW SHOULD HAVE GRANTED THE PETITION FOR A REHEARING.

This petition asked a rehearing so that the evidence might be taken down and reduced to a record, and the United States joined in asking the rehear-

ing. The Department of Justice was anxious, the same as ourselves, that the case should be presented here, as it was presented to the court below, and this could not be done without the testimony, and there is no mode recognized by law for reproducing the testimony in such a case as this. Under such circumstances where both parties ask a rehearing, the court should grant it, especially where the demands of substantial justice require it. No technical rule should stand in the way.

A REVIEW OF THE COURT'S OPINION.

The pith of the court's indictment of the appellant is contained in the following extract from its opinion:

“He admitted that he is a socialist and frequenter of assemblages of Socialists in which he participates as a speaker advocating a propaganda for radical changes in the institutions of the country. He claimed to have a clear understanding of the Constitution of the United States and knew that by one of its articles deprivation of life, liberty or property without due process of law, is forbidden and yet the evidence introduced in his behalf proved that the party with which he is affiliated and whose principles he advocates, has for its main object the complete elimination of property rights in this country. He expressed himself as being willing for people to retain their money, but insisting that all the land, buildings and industrial institutions should become the common property of all the people, which object is to be attained, according to his belief, by use of the power of the ballot, and when that object shall have been attained the political govern-

ment of the country will be entirely abrogated, because, there will be no use for it. And he further admitted that his beliefs on these subjects were entertained by him at and previous to the date of the proceedings in the Superior Court admitting him to become a citizen of the United States."

This quotation contains the gist of the objections of the court below to the political opinions of the appellant. These objections may be reduced to two, viz: (1) That collective ownership is unconstitutional because it deprives some one of his property without due process of law, and (2) that the present political organization of the nation is so protected by constitutional guaranties, that to substitute an industrial organization would be contrary to the principles of the constitution.

Both these propositions assume what is not true: that the people cannot change their form of government, and modify or repeal every provision of the constitution. There is no "principle" of the constitution so firmly established as the right to amend, modify or abrogate it if the people so ordain.

The collective ownership of property, is not a taking of property without due process. If the nation or the state should attempt outright confiscation as the means of *acquiring the property*, then the means might be forbidden by the due process clause, but evidently the appellant did not advocate confiscation, or the court below would have been swift to point it out.

The objection that to substitute an industrial for the present political organization of the nation would violate the principles of the constitution has about as much merit as the objection made by the

silversmiths of Ephesus to the substitution of the worship of the true God for the worship of Diana. They cried out with a loud voice and with one accord "Great is Diana of the Ephesians," not that they cared very much about Diana, but because their business would be affected. Human slavery once was held to be constitutional.

Finally, and above all we have said herein is the fact that the *principles* of our constitution are defined by that greatest charter of human liberty ever proclaimed to the human family—our Declaration of Independence—wherein it is said:

"We hold these truths to be self-evident, that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations upon such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

Upon this declaration of principles our constitution was framed and its provisions constructed. And yet, we submit that the court below, from the expressions in its rulings, seemed to be perfectly oblivious to the great fundamental principles which underlie the constitution of this country.

In conclusion we submit:

1. The petition is insufficient.
2. The testimony should have been reduced to a record.

3. The court below should have granted the petition for a rehearing.

GEO. MCKAY
J. A. W. NICHOLS
R. WINSOR
J. H. EASTERDAY

450 Arcade Building, Seattle, Wash.

No. 2170

United States
Circuit Court of Appeals

For the Ninth Circuit.

JESSE NOBLE, BEN BOONE, and
LUTHER C. HESS,

Appellants,

VS.

ALGOT GUSTAFSON,

Appellee

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Fourth Division.

FILED

OCT 22 1912

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No. 2170

United States
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Upon Appeal from the United States District Court for
the District of Alaska, Fourth Division.

INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the Territory of Alaska,
4th Division.*

No. 1664.

ALGOT GUSTAFSON,

Plaintiff,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C. HESS
and ED JERN,

Defendants.

Names and Addresses of Attorneys of Record.

JOHN L. MCGINN, Fairbanks, Alaska,

ARTHUR FRAME, Fairbanks, Alaska,

Attorneys for Defendants and Appellants.

G. B. ERWIN, Fairbanks, Alaska,

Attorney for Plaintiff and Appellee. [1*]

[Title of Court and Cause.]

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore presented to said court, and include in said transcript the following papers, to wit: ~~Amended~~ complaint, answer of defendants Jesse Noble, Luther C. Hess and Ben Boone, reply, judgment of the Court, bill of exceptions, order settling bill of exceptions, assignment of errors, petition for appeal, order allowing appeal,

*Page-number appearing at foot of page of original certified Record.

bond on appeal, citation, admission of service thereon, order extending return day, stipulation for printing the transcript, opinion of Court, if any, praecipe for the transcript.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and on file in the office of the clerk of said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, before the first day of August, 1912.

JOHN J. MCGINN and
ARTHUR FRAME,

Attorneys for Defendants Noble, Hess and Boone.
[2]

[Endorsements]: No. 1664. In the District Court for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Praecipe for Transcript of Record. Filed in the District Court, Territory of Alaska, 4th Div., May 4, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. J. L. McGinn & Arthur Frame, Attorneys for Defts. Fairbanks, Alaska. [3]

[Title of Court and Cause.]

Complaint.

Comes now the plaintiff, and for a cause of action against the defendants, alleges:

I.

That between the 1st day of April, 1911, and the 9th day of June, 1911, one Thomas Wright performed

68 days' work and labor upon that certain mine and premises known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres more or less of mineral land; that said work and labor performed by said Thomas Wright upon the said mine and premises described was

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Stipulation performed in running tunnels, opening
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^
cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches and timbering shafts upon said mine and premises, for the development and improvement thereof; that the said work and labor of said Thomas Wright was done and performed by him at the special instance and request of the defendant Ed. Jern, the person having charge of the construction, development and improvement of the

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as lessee of his codefendants

said mine and premises who then and
^
there promised and agreed to pay said Thomas Wright the sum of \$5.00 per day and board for each and every day's work and labor so done and performed by him upon said mine and premises as aforesaid.

II.

That the said Thomas Wright commenced to perform said work [4] and labor upon said mine and premises in the construction and development of said improvements thereon, on the 1st day of April, 1911,

and ceased to work and labor thereupon on the 9th day of June, 1911, and during the said period earned by his said work and labor upon said mine and premises described the total sum of \$340.00; that no part of the said sum \$340.00 has been paid, notwithstanding demand therefor, except the sum of \$150.00 on account, and there now remains due and owing for the said work and labor, after deducting all just credits and offsets, the sum of \$190.00.

III.

That at all the times mentioned in this complaint the defendants Jesse Noble, Ben Boone and Luther C. Hess were and now are the owners and reputed owners of the said mine and premises above described, and the whole thereof; that at all of said times the said defendant Ed. Jern had charge of the construction, development and improvement of the said mine and premises hereinbefore de-

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and lessee

scribed, and was the agent of the said defendants Jesse Noble, Ben Boone and Luther C. Hess; that at all times between the said 1st day of April, 1911, and the said 9th day of June, 1911, the said Jesse Noble, Ben Boone and Luther C. Hess had knowledge of the construction, development and improvement of said mine and premises, and had knowledge of the hiring and employment of said Thomas Wright therein, and of the work and labor done and performed by said Thomas Wright upon said mine and premises and acquiesced and consented thereto. That the work and labor of the said Thomas Wright, done and performed by him, as

aforesaid, upon said mine and premises described, enhanced and increased the value of the said mine and premises to the extent of the sum of \$340.00, and more than said sum; and the said defendants, Jesse Noble, Ben Boone and Luther C. Hess gave or posted no notice whatever that they would not be responsible for said [5] work and labor done and performed upon said mine and premises.

IV.

That on the 12th day of June, 1911, and within 30 days after the said Thomas Wright had ceased to work and labor upon said mine and premises, for the purpose of securing and perfecting a lien upon the said mine and premises under the provisions of chapter 28 of Title III, of the Alaska Code of Civil Procedure, the said Thomas Wright caused to be prepared and filed for record in the office of the recorder in and for the said Fairbanks Recording District, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his demand after deducting all just credits and offsets, with the names of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification—which claim was duly verified by the oath of the said Thomas Wright, and the same was thereafter duly recorded in the records of the said Fairbanks Recording District, a copy of which is hereunto attached, marked Exhibit "A."

V.

That the said Thomas Wright paid for filing and

recording the said notice and claim of lien, the sum of \$3.70; and the sum of \$50 is a reasonable attorney's fee to be allowed plaintiff for the preparation of said claim of lien and the foreclosure of the lien in said suit.

VI.

That on the 15th day of June, 1911, for a valuable consideration, the said Thomas Wright, duly assigned, transferred and set over to plaintiff Algot Gustafson his said lien, and the said indebtedness of \$190.00 secured thereby, and all sums due or to become due thereupon, and said plaintiff is now owner and holder of the same. [6]

And for a second and separate cause of action against the defendants, the plaintiff alleges:

I.

That between the 1st day of May, 1911, and the 26th day of May, 1911, one Victor Anderson performed 21 days' work and labor upon that certain mine and premises known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres more or less of mineral land; that said work and labor performed by said Victor Anderson upon the said mine and premises described was performed in running tunnels, opening cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches and timbering shafts upon said mine and premises, for the development and improvement thereof; that the said work and labor of said Victor Anderson was done and

performed by him at the special instance and request of the defendant Ed Jern, the person having charge of the construction, development and improvement as lessee of his codefendants

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12/15/11 of the said mine and premises, who then
and there promised and agreed to pay said Victor Anderson the sum of \$5.00 per day and board for each and every day's work and labor so done and performed by him upon said mine and premises as aforesaid.

II.

That the said Victor Anderson commenced to perform said work and labor upon said mine and premises in the construction and development of said improvements thereon, on the 1st day of May, 1911, and ceased to work and labor thereupon on the 26th day of May, 1911, and during the said period earned by his said work and labor upon said mine and premises described the total sum of \$105.00; that no part of the said sum of \$105.00 has been paid, notwithstanding demand therefor, and there now remains due and owing for the said work and labor, after deducting [7] all just credits and offsets, the sum of \$105.00.

III.

That at all the times mentioned in this complaint the defendants Jesse Noble, Ben Boone and Luther C. Hess were and now are the owners and reputed owners of the said mine and premises above described, and the whole thereof; that at all of said times the said defendant Ed Jern had charge of the construction, development and improvement of the

said mine and premises hereinbefore de-
and lessee

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scribed, and was the agent of the said
defendants Jesse Noble, Ben Boone and Luther C.
Hess; that at all times between the said 1st day of
May, 1911, and the 26th day of May, 1911, the said
Jesse Noble, Ben Boone and Luther C. Hess had
knowledge of the construction, development and im-
provement of said mine and premises, and had
knowledge of the hiring and employment of said
Victor Anderson therein, and of the work and labor
done and performed by said Victor Anderson upon
said mine and premises and acquiesced and con-
sented thereto. That the work and labor of the said
Victor Anderson done and performed by him as
aforesaid upon said mine and premises described
enhanced and increased the value of the said mine
and premises to the extent of the sum of \$105.00 and
more than said sum; and the said defendants Jesse
Noble, Ben Boone and Luther C. Hess gave or posted
no notice whatever that they would not be respon-
sible for said work and labor done and performed
upon said mine and premises.

IV.

That on the 12th day of June, 1911, and within 30
days after the said Victor Anderson had ceased to
work and labor upon said mine and premises, for the
purpose of securing and perfecting a lien upon the
said mine and premises under the provisions of
chapter 28 of Title III, of the Alaska Code of Civil
Procedure, the said Victor Anderson caused to be

prepared and filed for record in the office of the recorder in and for the said Fairbanks Recording District, wherein said mine and [8] premises are situate, a notice and claim of lien containing a true statement of his demand after deducting all just credits and offsets, with the name of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification—which claim was duly verified by the oath of the said Victor Anderson, and the same was thereafter duly recorded in the records of the said Fairbanks Recording District, a copy of which is hereunto attached and marked Exhibit “B.”

V.

That the said Victor Anderson paid for filing and recording the said notice and claim of lien, the sum of \$3.70; and the sum of \$50 is a reasonable attorney’s fee to be allowed plaintiff for the preparation of said claim of lien and the foreclosure of the lien in said suit.

VI.

That on the 15th day of June, 1911, for a valuable consideration, the said Victor Anderson, duly assigned, transferred and set over to plaintiff Algot Gustafson his said lien, and the said indebtedness of \$105.00 secured thereby, and all sums due or to become due thereupon, and said plaintiff is now owner and holder of the same.

And for a third and separate cause of action against defendants, the plaintiff alleges:

I.

That between the 16th day of May, 1911, and the 1st day of June, 1911, one Gust Honk performed eight days and nine hours' work and labor upon that certain mine and premises known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres more or less of mineral land; that said work and labor performed by said Gust Honk upon the said mine and premises [9] described, was performed in running tunnels, opening cross-cuts, drifting and excavating and hoisting gold-bearing gravels, building flumes and ditches and timbering shafts upon said mine and premises, for the development and improvement thereof; that the said work and labor of said Gust Honk was done and performed by him at the special instance and request of the defendant Ed. Jern, the person having charge of the construction, development, and improvement of the said mine

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as lessee of his codefendants

and premises, who then and there promised

and agreed to pay said Gust Honk, the sum of \$7.00 per day and board for each and every day's work and labor so done and performed by him upon said mine and premises as aforesaid.

II.

That said Gust Honk commenced to perform work and labor upon said mine and premises in the construction and development of said improvements thereon, on the 16th day of May, 1911, and ceased to

work and labor thereupon on the 1st day of June, 1911, and during the said period earned by his said work and labor upon said mine and premises described the total sum of \$62.50; that no part of said sum of \$62.50 has been paid, notwithstanding demand therefor, and there now remains due and owing for the said work and labor, after deducting all just credits and offsets, the sum of \$62.50.

III.

That at all the times mentioned in this complaint the defendants Jesse Noble, Ben Boone and Luther C. Hess were and now are the owners and reputed owners of the said mine and premises above described, and the whole thereof; that at all of said times the said defendant Ed Jern had charge of the construction, development and improvement of
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and lessee

scribed, and was the agent of the said [10]
defendants Jesse Noble, Ben Boone[^] and Luther C. Hess; that at all times between the said 16th day of May, 1911, and the 1st day of June, 1911, the said Jesse Noble, Ben Boone and Luther C. Hess had knowledge of the construction, development and improvement of said mine and premises, and had knowledge of the hiring and employment of said Gust Honk therein, and of the work and labor done and performed by said Gust Honk upon said mine and premises and acquiesced and consented thereto. That the work and labor of the said Gust Honk done and performed by him as aforesaid upon said mine and premises described, enhanced and increased the

value of the said mine and premises to the extent of the sum of \$62.50, and more than said sum; and the said defendants Jesse Noble, Ben Boone and Luther C. Hess gave or posted no notice whatever that they would not be responsible for said work and labor done and performed upon said mine and premises.

IV.

That on the 12th day of June, 1911, and within 30 days after the said Gust Honk has ceased to work and labor upon said mine and premises, for the purpose of securing and perfecting a lien upon the said mine and premises under the provisions of Chapter 28 of Title III, of the Alaska Code of Civil Procedure, the said Gust Honk caused to be prepared and filed for record in the office of the recorder in and for the said Fairbanks Recording District, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his demand after deducting all just credits and offsets, with the names of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification—which claim was duly verified by the oath of the said Gust Honk, and the same was thereafter duly recorded in the records of the said Fairbanks Recording District, a copy of which is hereunto attached and marked Exhibit “C.” [11]

V.

That the said Gust Honk paid for filing and record-

ing the said notice and claim of lien the sum of \$3.70; and the sum of \$50 is a reasonable attorney's fee to be allowed plaintiff for the preparation of said claim of lien and the foreclosure of the lien in said suit.

VI.

That on the 15th day of June, 1911, for a valuable consideration, the said Gust Honk duly assigned, transferred and set over to plaintiff Algot Gustafson his said lien, and the said indebtedness of \$62.50 secured thereby, and all sums due or to become due thereupon, and said plaintiff is now owner and holder of the same.

And for a fourth and separate cause of action against defendants, the plaintiff alleges:

I.

That between the 29th day of April, 1911, and the 3d day of June, 1911, one Knute Peterson performed 29 and 1/10 days' work and labor upon that certain mine and premises known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres more or less of mineral land; that said work and labor performed by said Knute Peterson upon the said mine and premises described was performed in running tunnels, opening cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, build-flumes and ditches and timbering shafts upon said mine and premises, for the development and improvement thereof; that the said work and labor of said Knute Peterson was done and performed by him at the special instance and request of

the defendant Ed Jern, the person having charge of the construction, development and improvement of the said mine and premises, who then and there promised and agreed to pay said Knute Peterson [12] the sum of \$5.00 per day and board for each and every day's work and labor so done and performed by him upon said mine and premises as aforesaid.

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II.

That the said Knute Peterson commenced to perform said work and labor upon said mine and premises in the construction and development of said improvements thereon, on the 29th day of April, 1911, and ceased to work and labor thereupon on the 3d day of June, 1911, and during the said period earned by his said work and labor upon said mine and premises described the total sum of \$145.00; that no part of said sum of \$145.00 has been paid notwithstanding demand therefor, and there now remains due and owing for the said work and labor, after deducting all just credits and offsets, the sum of \$145.00.

III.

That at all the times mentioned in this complaint the defendants Jesse Noble, Ben Boone and Luther C. Hess were and now are the owners and reputed owners of the said mine and premises above described, and the whole thereof; that at all of said times the said defendant Ed Jern had charge of the construction, development and improvement of the

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said mine and premises hereinbefore de-
and lessee
scribed, and was the agent of the said
defendants Jesse Noble, Ben Boone and Luther C.
Hess; that at all times between the said 29th day of
April, 1911, and the 3d day of June, 1911, the said
Jesse Noble, Ben Boone and Luther C. Hess had
knowledge of the construction, development and im-
provement of said mine and premises, and had knowl-
edge of the hiring and employment of said Knute
Peterson therein, and of the work and labor done and
performed by said Knute Peterson upon said mine
and premises and acquiesced and consented thereto.
That the work and labor of the said Knute Peterson
done and performed by him as aforesaid upon said
mine and premises described, enhanced and increased
the value of [13] of the said mine and premises
to the extent of the sum of \$145.00, and more than
said sum; and the said defendants Jesse Noble, Ben
Boone and Luther C. Hess gave or posted no notice
whatever that they would not be responsible for said
work and labor done and performed upon said mine
and premises.

IV.

That on the 12th day of June, 1911, and within 30
days after the said Knute Peterson had ceased to
work and labor upon said mine and premises, for the
purpose of securing and perfecting a lien upon the
said mine and premises under the provisions of Chap-
ter 28 of Title III, of the Alaska Code of Civil Pro-
cedure, the said Knute Peterson caused to be pre-
pared and filed for record in the office of the recorder

in and for the said Fairbanks Recording District, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his demand after deducting all just credits and offsets, with the name of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification—which claim was duly verified by the oath of the said Knute Peterson, and the same was thereafter duly recorded in the records of the said Fairbanks Recording District, a copy of which is hereunto attached and marked Exhibit “D.”

V.

That the said Knute Peterson paid for filing and recording the said notice and claim of lien, the sum of \$3.70; and the sum of \$50 is a reasonable attorney’s fee to be allowed plaintiff for the preparation of said claim of lien and the foreclosure of the lien in said suit.

VI.

That on the 15th day of June, 1911, for a valuable consideration, the said Knute Peterson duly assigned, transferred and set over to plaintiff Algot Gustafson his said lien, and the said indebtedness of \$145.00 secured thereby, and all sums due [14] or to become due thereupon, and said plaintiff is now owner and holder of the same.

And for a fifth and separate cause of action against defendants, the plaintiff alleges:

I.

That between the 16th day of May, 1911, and the

4th day of June, 1911, one Carl Strass performed 19 days' work and labor upon that certain mine and premises known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres more or less of mineral land; that said work and labor performed by said Carl Strass upon the said mine and premises described, was performed in running tunnels, opening cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches and timbering shafts upon said mine and premises, for the development and improvement thereof; that the said work and labor of said Carl Strass was done and performed by him at the special instance and request of the defendant Ed Jern, the person having charge of the construction, development and improve-

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as lessee of his codefendants

ment of the said mine and premises, who then and there promised and agreed to pay said Carl Strass the sum of \$6.00 per day and board for each and every day's work and labor so done and performed by him upon said mine and premises as aforesaid.

II.

That the said Carl Strass commenced to perform said work and labor upon said mine and premises in the construction and development of said improvements thereon, on the 16th day of May, 1911, and ceased to work and labor thereupon on the 4th day of June, 1911, and during the said period earned

by his said work and labor upon said mine and premises described the total sum of \$114.00; that no part of the said sum of \$114.00 has been paid notwithstanding demand therefor, and there now remains due and owing for the said work and labor, after deducting [15] all just credits and offsets, the sum of \$114.00.

III.

That at all the times mentioned in this complaint the defendants Jess Noble, Ben Boone and Luther C. Hess were and now are the owners and reputed owners of the said mine and premises above described, and the whole thereof; that at all of said times the said defendant Ed Jern had charge of the construction, development and improvement of the said mine and premises hereinbefore described, and

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and lessee

was the agent of the said defendants Jesse Noble, Ben Boone and [^]Luther C. Hess; that at all times between the said 16th day of May, 1911, and the said 4th day of June, 1911, the said Jesse Noble, Ben Boone and Luther C. Hess had knowledge of the construction, development and improvement of said mine and premises, and had knowledge of the hiring and employment of the said Carl Strass therein, and of the work and labor done and performed by said Carl Strass upon said mine and premises and acquiesced and consented thereto. That the work and labor of the said Carl Strass done and performed by him as aforesaid upon said mine and premises described enhanced and increased the value of the said mine and premises to the extent of the

sum of \$114.00, and more than said sum; and the said defendants Jesse Noble, Ben Boone and Luther C. Hess gave or posted no notice whatever that they would not be responsible for said work and labor done and performed upon said mine and premises.

IV.

That on the 12th day of June, 1911, and within 30 days after the said Carl Strass had ceased to work and labor upon said mine and premises, for the purpose of securing and perfecting a lien upon the said mine and premises under the provisions of Chapter 28 of Title III, of the Alaska Code of Civil Procedure, the said Carl Strass caused to be prepared and filed for record in the office of the recorder in and for the [16] said Fairbanks Recording District, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his demand after deducting all just credits and offsets, with the name of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification—which claim was duly verified by the oath of the said Carl Strass, and the same was thereafter duly recorded in the records of the said Fairbanks Recording District, a copy of which is hereunto attached and marked Exhibit “E.”

V.

That the said Carl Strass paid for filing and recording the said notice and claim of lien the sum of \$3.70; and the sum of \$50 is a reasonable attorney's fee to be allowed plaintiff for the preparation of said

claim of lien and the foreclosure of the lien in said suit.

VI.

That on the 15th day of June, 1911, for a valuable consideration the said Carl Strass duly assigned, transferred and set over to plaintiff Algot Gustafson his said lien, and the said indebtedness of \$114.00 secured thereby, and all sums due or to become due thereupon, and said plaintiff is now owner and holder of the same.

And for a sixth and separate cause of action against defendants, the plaintiff alleges:

I.

That between the 1st day of May, 1911, and the 1st day of June, 1911, the plaintiff Algot Gustafson performed 29 and $\frac{1}{2}$ days' work and labor upon that certain mine and premises known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres more or less of mineral land; that said work [17] and labor performed by said plaintiff upon the said mine and premises described, was performed in running tunnels, opening cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches and timbering shafts upon said mine and premises, for the development and improvement thereof; that the said work and labor of said plaintiff was done and performed by him at the special instance and request of the defendant Ed Jern, the person having charge of

the construction, development and improve-
ment of the said mine and premises, who^Λ then and there promised and agreed to pay said plaintiff the sum of \$5.00 per day and board for each and every day's work and labor so done and performed by him upon said mine and premises as aforesaid.

II.

That plaintiff commenced to perform said work and labor upon said mine and premises in the construction and development of said improvements thereon, on the 1st day of May, 1911, and ceased to work and labor thereupon on the 1st day of June, 1911, and during the said period earned by his said work and labor upon said mine and premises described the total sum of \$147.50; that no part of the said sum of \$147.50 has been paid, notwithstanding demand therefor, and there now remains due and owing for the said work and labor, after deducting all just credits and offsets, the sum of \$147.50.

III.

That at all the times mentioned in this complaint the defendants Jesse Noble, Ben Boone and Luther C. Hess were and now are the owners and reputed owners of the said mine and premises above described, and the whole thereof; that at all of said times the said defendant Ed Jern had charge of the construction, development and improvement of the said mine and premises hereinbefore described, and was the agent of the said^Λ

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defendants Jesse Noble, Ben Boone and Luther C. Hess; that at all times between the said 1st day of May, 1911, and the 1st [18] day of June, 1911, the said Jesse Noble, Ben Boone and Luther C. Hess had knowledge of the construction, development and improvement of said mine and premises, and had knowledge of the hiring and employment of said plaintiff therein, and of the work and labor done and performed by said plaintiff upon said mine and premises and acquiesced and consented thereto. That the work and labor of the said plaintiff done and performed by him as aforesaid upon said mine and premises described, enhanced and increased the value of the said mine and premises to the extent of the sum of \$147.50, and more than said sum; and the said defendants Jesse Noble, Ben Boone and Luther C. Hess gave or posted no notice whatever that they would not be responsible for said work and labor done and performed upon said mine and premises.

IV.

That on the 12th day of June, 1911, and within 30 days after the said plaintiff had ceased to work and labor upon said mine and premises, for the purpose of securing and perfecting a lien upon the said mine and premises under the provisions of Chapter 28 of Title III, of the Alaska Code of Civil Procedure, the said plaintiff caused to be prepared and filed for record in the office of the recorder in and for the said Fairbanks Recording District, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his demand after deducting all just credits and offsets, with the name of

the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification—which claim was duly verified by the oath of the said plaintiff, and the same was thereafter duly recorded in the records of the said Fairbanks Recording District, a copy of which is hereunto attached and marked Exhibit “F.” [19]

V.

That the said plaintiff paid for filing and recording the said notice and claim of lien, the sum of \$3.70; and the sum of \$50 is a reasonable attorney’s fee to be allowed plaintiff for the preparation of said claim of lien and the foreclosure of the lien in said suit.

WHEREFORE plaintiff prays judgment against defendants for the sum of \$190.00, with interest thereon at 8% per annum from the 9th day of June, 1911, and \$3.70 filing fees paid, and \$50.00 attorney’s fees upon plaintiff’s first cause of action herein set forth; for the sum of \$105.00, with interest thereon at 8% per annum from the 26th day of May, 1911, and \$3.70 filing fees paid, and \$50.00 attorney’s fee upon plaintiff’s second cause of action herein set forth; for the sum of \$62.50, with interest thereon at 8% per annum from the 1st day of June, 1911, and \$3.70 filing fees paid, and \$50.00 attorney’s fees upon plaintiff’s third cause of action herein set forth; for the sum of \$145.50, with interest thereon at 8% per annum from the 3d day of June, 1911, and \$3.70 filing fee paid, and \$50.00 attorney’s fee upon plaintiff’s fourth cause of action hereinbefore set forth; for the

sum of \$114.00, with interest thereon at 8% per annum from the 4th day of June, 1911, and \$3.70 filing fee paid, and \$50.00 attorney's fee upon plaintiff's fifth cause of action hereinbefore set forth; for the sum of \$147.50 with interest thereon at 8% per annum from 1st day of June, 1911, and \$3.70 filing fee paid and \$50 attorney's fee upon plaintiff's sixth cause of action hereinbefore set forth; that the said sums and each and all of them be adjudged and decreed to be a valid and subsisting lien and charge upon the said mine and premises hereinbefore mentioned and described and the whole thereof, paramount and superior to any and all other liens, charges and encumbrances (if any); that the said mine and premises and the whole thereof may be [20] sold in the manner prescribed by law, pursuant to the judgment and decree of this Honorable Court, and that out of the proceeds arising from such sale the plaintiff be paid the total amount of said sums of principal debt, interest, filing fees, attorney's fees hereinbefore mentioned and set forth in respect of said several causes of action herein, together with the costs and expenses of this suit and of said sale; that in case the proceeds of said sale shall be insufficient to fully pay and satisfy all said sums of principal debt, interest, filing fees, attorney's fees, costs and expenses, then and in that event that plaintiff shall have judgment against said defendants for any and all such deficiency; and also that plaintiff have such further and other relief as to this Honorable Court may seem just and equitable in the premises.

G. B. ERWIN,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

Algot Gustafson, being first duly sworn on oath, deposes and says: That I am the plaintiff named in the foregoing complaint in the above-entitled action; that I know the contents of the said complaint, and that the same is true as I verily believe.

ALGOT GUSTAFSON.

Subscribed and sworn to before me the 14th day of July, 1911.

[Seal]

G. B. ERWIN,

A Notary Public in and for the Territory of Alaska.

[21]

Exhibit "A."

*In the District Court for the Territory of Alaska,
Fourth Division.*

THOMAS WRIGHT,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C.
HESS and ED. JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the Said Jesse Noble, Ben Boone, Luther C. Hess and Ed. Jern, and All Others Whom It may Concern:

NOTICE IS HEREBY GIVEN, that Thomas Wright claims a lien upon that certain placer mining

claim and mine known as Creek Placer Mining Claim Number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property as cook for workmen engaged in digging tunnels, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts, and also as a miner and laborer in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 68 days' work and labor, at the agreed price of \$5.00 per day and board, amounting to the sum of \$340.00; that no part of said sum has been paid except \$150.00 on account thereof, and there now remains due claimant for said work and labor, the sum of \$190.00, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 1st day of

April, 1911, and ceased said work and labor on the 9th day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid *as* the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June, A. D. 1911.

THOS. WRIGHT,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Thomas Wright, being first duly sworn upon oath, depose and say: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

THOS. WRIGHT.

Subscribed and sworn to before me this 10th day of June, A. D. 1911.

[Seal] SAMUEL R. WEISS,
Commissioner and Ex-officio Justice of the Peace.

Exhibit "B."

*In the District Court for the Territory of Alaska,
Fourth Division.*

VICTOR ANDERSON,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C.
HESS and ED. JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the Said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and All Others Whom It may
Concern:

NOTICE IS HEREBY GIVEN, that Victor Anderson claims a lien upon that certain placer claim and mine known as Creek Placer Mining Claim Number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property de-

scribed, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 21 days' work and labor, at the agreed price of \$5.00 per day and board, amounting to the sum of \$105.00; that no part of said sum has been paid on account thereof, and that now remains due claimant for said work and labor, the sum of \$105.00, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 1st day of May, 1911, and ceased said work and labor on the 26th day of May, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June, A. D. 1911.

VICTOR ANDERSON,

Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Victor Anderson, being first duly sworn upon oath, depose and say: That I am the claimant named

in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

VICTOR ANDERSON.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Seal]

SAMUEL R. WEISS,
Commissioner and Ex-officio Justice of the Peace.

[23]

Exhibit "C."

*In the District Court for the Territory of Alaska,
Fourth Division.*

GUST HONK,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C. HESS
and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and All Others Whom It May
Concern:

NOTICE IS HEREBY GIVEN that Gust Honk claims a lien upon that certain placer claim and mine known as Creek Placer Mining Claim Number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for

work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 8 days, 9 hours work and labor, at the agreed price of \$7.00 per day and board, amounting to the sum of \$62.50; that no part of said sum has been paid on account thereof, and there now remains due claimant for said work and labor, the sum of \$62.50; after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 16th day of May, 1911, and ceased said work and labor on the 1st day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June,
A. D., 1911.

GUST HONK,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Gust Honk, being first duly sworn upon oath,
depose and say: That I am the claimant named in
the foregoing notice and claim of lien; that I have
heard the same read and know the contents thereof,
and that I believe the same to be true.

GUST HONK.

Subscribed and sworn to before me the 10th day
of June, A. D., 1911.

[Seal]

SAMUEL R. WEISS,

Commissioner and ex-Officio Justice of the Peace.

[24]

Exhibit "D."

*In the District Court for the Territory of Alaska,
Fourth Division.*

KNUTE PETERSON,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C. HESS
and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and all Others Whom it may Con-
cern.

NOTICE IS HEREBY GIVEN that Knute Peter-

son claims a lien upon that certain placer claim and mine known as Creek Placer Mining Claim Number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 29½ days' work and labor, at the agreed price of \$5.00 per day and board, amounting to the sum of \$145.50; that no part of said sum has been paid except \$———— on account thereof, and there now remains due claimant for said work and labor, the sum of \$————, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 29th day

of April, 1911, and ceased said work and labor on the 3rd day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanike, Alaska, the 10th day of June, A. D., 1911.

KNUTE PETERSON,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Knute Peterson, being first duly sworn upon oath, depose and say: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

KNUTE PETERSON.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Seal]

SAMUEL R. WEISS,
Commissioner and ex-Officio Justice of the Peace.

[25]

Exhibit "E."

*In the District Court for the Territory of Alaska,
Fourth Division.*

CARL STRASS,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C. HESS
and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and all Others Whom it May Con-
cern:

NOTICE IS HEREBY GIVEN that CARL STRASS claims a lien upon that certain placer claim and mine known as Creek Placer Mining Claim Number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are

Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 19 days' work and labor, at the agreed price of \$6.00 per day and board, amounting to the sum of \$114.00; that no part of said sum has been paid on account thereof, and there now remains due claimant for said work and labor the sum of \$114.00, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 16th day of May, 1911, and ceased said work and labor on the 4th day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June, A. D., 1911.

CARL STRASS,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Carl Strass, being first duly sworn upon oath, depose and say: That I am the claimant named in

the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

CARL STRASS.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Seal]

SAMUEL R. WEISS,
Commissioner and ex-Officio Justice of the Peace.
[26]

Exhibit "F."

*In the District Court for the Territory of Alaska,
Fourth Division.*

ALGOT GUSTAFSON,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C. HESS
and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and all Others Whom it May Con-
cern:

NOTICE IS HEREBY GIVEN, that ALGOT GUSTAFSON claims a lien upon that certain placer claim and mine known as Creek Placer Mining Claim Number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances

and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of $291\frac{1}{2}$ days' work and labor, at the agreed price of \$5.00 per day and board, amounting to the sum of \$147.50; that no part of said sum has been paid on account thereof, and there now remains due claimant for said work and labor the sum of \$147.50, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 1st day of May, 1911, and ceased said work and labor on the 1st day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with

the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June,
A. D., 1911.

ALGOT GUSTAFSON.

Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Algot Gustafson, being first duly sworn upon oath, depose and say: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

ALGOT GUSTAFSON.

Subscribed and sworn to before me the 10th day of June, A. D., 1911.

[Seal]

SAMUEL R. WEISS,

Commissioner and ex-Officio Justice of the Peace.

[27]

[Endorsements]: No. 1664. District Court, Territory of Alaska, 4th Division. Algot Gustafson vs. Jesse Noble et al. Complaint. Filed in the District Court, Territory of Alaska, 4th Div., Jul. 14, 1911. C. C. Page, Clerk. By G. A. Gates, Deputy. Guy B. Erwin, Attorney for Plaintiff. [28]

[Title of Court and Cause.]

Answer of Defendants Noble, Hess and Boone.

Come now the above-named defendants Jesse Noble, Luther C. Hess and Ben Boone and for answer to plaintiff's complaint say:

I.

Deny each and every allegation, matter and thing contained in paragraph 1 of each of plaintiff's first, second, third, fourth, fifth and sixth causes of action.

II.

As to the matters and things alleged in paragraph 2 of each of plaintiff's first, second, third, fourth, fifth and sixth causes of action, defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

III.

Deny the allegations of paragraph 3 of each of said plaintiff's first, second, third, fourth, fifth and sixth causes of action, excepting that the defendants Luther C. Hess and Ben Boone are the owners of said placer mining claim mentioned therein and known as claim Number 2 Above Discovery and Wolf Creek, and that the defendant Jern at said time was their lessee.

IV.

Deny the allegations of paragraph 4 of each of said plaintiff's first, second, third, fourth, fifth and sixth causes of action. [29]

V.

Deny that the sum of fifty dollars is a reasonable attorney's fee to be allowed for foreclosing each of the liens mentioned in the first, second, third, fourth, fifth and sixth causes of action of plaintiff's complaint.

VI.

As to the matters and things alleged in paragraph 6 of each of plaintiff's first, second, third, fourth,

fifth and sixth causes of action, said defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

For a further affirmative answer and defence to each of said plaintiff's first, second, third, fourth, fifth and sixth causes of action, said defendants allege:

I.

That said property mentioned in said complaint and in each of said causes of action and known as creek claim Number 2 Above Discovery on Wolf Creek is a placer mining claim and that the same had been operated by the ~~owners of said claim by and through their~~ lessees of the owners of said claim for a period of more than two years prior to the institution of said suit;

That on the 23d day of March, 1909, the owners of said claim executed a lease in favor of one Charles J. Erickson to work and mine said claim, and that thereafter and on the 2d day of September, 1910, said Erickson transferred his interest in said lease to the above-named defendant Ed Jern; that thereafter the said Ed Jern entered into possession of said claim and began to work and operate the same as a placer mine and continued in the possession and operation of said property until about the 5th day of June, 1911; that during said time, and during the time mentioned in plaintiff's complaint, all work and labor done and performed upon the said property by any [30] person and particularly by the plaintiff above named and the lien claimants mentioned in said complaint were performed in the

operation of said property by said Jern as a placer mine and in extracting and removing the pay-dirt and gold-dust therefrom; and that the said defendants during said time kept posted upon said property in conspicuous places notices to the effect that the owners of said property would not be responsible for any work and labor done and performed thereon by their lessees.

WHEREFORE said defendants, having answered plaintiff's complaint, pray that the same may be dismissed and that said defendants recover their costs and disbursements herein necessarily incurred.

JOHN L. MCGINN and
ARTHUR FRAME,

Attorneys for Defendants Noble, Hess and Boone.

United States of America,
District of Alaska,—ss.

I, Luther C. Hess, being first duly sworn on oath, depose and say: That I am one of the defendants named in the annexed answer in the above-entitled action; that I have heard the said answer read and know the contents thereof, and believe the same to be true.

LUTHER C. HESS.

Subscribed and sworn to before me, the 21st day of March, 1912.

[Seal]

ARTHUR FRAME,

Notary Public in and for the Dist. of Alaska.

Service of a copy of the foregoing Answer admitted this 21st day of March, 1912.

G. B. ERWIN,
Attorney for Pltff. [31]

[Endorsements]: No. 1664. In the District Court, for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Answer of Defendants Noble, Hess and Boone. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 21, 1912. C. C. Page, Clerk. By G. F. Gates, Deputy. McGinn & Sullivan, Attorneys for Defts. Noble, Hess & Boone. Fairbanks, Alaska. [32]

[Title of Court and Cause.]

Reply.

Comes now the above-named plaintiff and for a reply to the further affirmative answer and defense of the defendants Jesse Noble, Luther C. Hess and Ben Boone, alleges as follows:

I.

Plaintiff denies each and every allegation contained in said further and affirmative answer and defense, except that plaintiff admits that Creek Claim Number Two Above Discovery on Wolf Creek is a Placer Mining Claim, and that the said Ed Jern was in possession of said property during the period the plaintiff and the lien claimants mentioned in the complaint performed the work and labor for which they claim a lien.

Plaintiff further alleges that all of the work and labor done and performed upon the said property by himself and the lien claimants mentioned in the complaint herein, was done and performed in the development and improvement of said claim in open-

ing up and prospecting a virgin block of ground or portion of said claim that had not theretofore been mined or worked, in the endeavor to find gold in paying quantities, and that the pay-dirt and gold-dust, if any, extracted and removed from said mine and workings was only such as had to be removed and hoisted to the surface in sinking a shaft and running tunnels in opening up and prospecting the said virgin block of ground.

Plaintiff denies that the defendants during said time or any part of the time in which the plaintiff and the lien claimants performed labor on said mining claims posted or kept [33] posted upon said property in conspicuous places notices to the effect that the owners of said property would not be responsible for any work and labor done and performed thereon, by their lessees.

WHEREFORE plaintiff asks for the relief in his complaint prayed for.

Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

Algot Gustafson, being first duly sworn, deposes and says; That he is the plaintiff named in the within entitled action, the he has read the foregoing Reply, knows the contents thereof, and that the same is true.

ALGOT GUSTAFSON.

Subscribed and sworn to before me this 1st day of April, 1912.

G. B. ERWIN,

A Notary Public in and for the Territory of Alaska.

[Endorsements]: No. 1664. District Court, Territory of Alaska, 4th Division. Algot Gustafson vs. Jesse Noble et al. Reply. Filed in the District Court, Territory of Alaska, 4th Div. April 1, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. G. B. Erwin, Attorney for Plaintiff. [34]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED: THAT this cause came on regularly for trial at 10 o'clock A. M. of April 1st, 1912, before Honorable Peter D. Overfield, Judge of above-entitled court, G. B. Erwin, Esq., appeared as attorney for plaintiff and Arthur Frame, Esq., as attorney for defendants Noble, Hess and Boone; whereupon the following proceedings were had and testimony was taken:

The defendants asked for a continuance, pursuant to their motion and affidavit therefor, which motion was resisted by the plaintiff. The matter was discussed between said attorneys who then entered into the following stipulation:

Mr. ERWIN.—I will admit that Ed Jern would testify as set forth in his affidavit—

The COURT.—Designate the part of the affidavit that you refer to.

Mr. ERWIN.—I refer to the affidavit made by the defendant Ed Jern on the 19th day of July, 1911,

paragraph No. 5 of the affidavit.

The COURT.—Go ahead with your stipulation.

Mr. FRAME.—Further, that these notices were posted on the center stakes at the upper and lower ends of the claim.

Mr. ERWIN.—We stipulate that if the defendant Ed Jern were present he would testify that notices were posted in conspicuous places on said claim and they could be easily seen, to wit; one at the lower end of said claim and the other at the upper end [36] of said claim.

Mr. FRAME.—All right. And that these notices were to the effect that the owners wouldn't be responsible for debts contracted for labor.

Mr. ERWIN.—Yes. We do not admit the truth of that, but simply that he would so testify.

The COURT.—Yes, I understand. You simply admit that if Jern were here he would so testify.

Whereupon, after reading the pleadings, the trial proceeded as follows:

[Testimony of Algot Gustafson, for Plaintiff.]

ALGOT GUSTAFSON, after being first duly sworn, testified on behalf of plaintiff as follows, to wit:

Direct Examination.

(By Mr. ERWIN.)

Q. You are the plaintiff in this action?

A. Yes.

Q. Your name is Algot Gustafson? A. Yes.

Q. Do you know the defendants mentioned here?

A. Yes.

Q. (Continuing.) Jesse Noble, Ben Boone,

(Testimony of Algot Gustafson.)

Luther C. Hess and Ed Jern? A. Yes, sir.

Q. Were you acquainted with placer mining claim known as creek claim No. 2, Above Discovery on Wolf Creek? A. Yes.

Q. State to the Court whether you ever performed any labor upon that claim.

A. I worked from the 14th of November, 1910, until the 1st of June, 1911, on that claim.

Q. What work were you doing on that claim?

A. I was working in the mine until the first part of March. [37]

Mr. FRAME.—We object to this as immaterial and irrelevant and incompetent, as not within the period for which their lien claims.

The COURT.—You need not go into their employment except for the time that the lien is filed for. Make the record short.

Q. (By Mr. ERWIN.) When did you quit work on the claim?

A. I quit the 1st of June, 1911.

Q. Were you paid up to the time you ceased working there? A. No.

Q. Do you remember what the amount was that was due you at that time? A. \$147.50.

Q. Did you file a lien at that time for your work and labor? A. Yes.

Q. I hand you a copy of notice of lien, and ask you to look at that and see if that is the claim of lien that you filed at that time. Look at the signature and you can tell from that. Is that your signature?

A. That is my signature.

(Testimony of Algot Gustafson.)

Q. You say here that your work consisted of 29½ days' work and labor at the agreed price of \$5.00 per day.

Mr. FRAME.—We object to this line of examination. Let the witness state what work he did.

Q. (By Mr. ERWIN.) Just state what work and how many days' work you claim there that you have not been paid for. How many days—

Mr. FRAME.—During what time?

A. It is from the 1st of May to the 1st of June. Sometimes I lost a half a day or so; but some 29 days and some hours, 5 hours, I think.

Q. (By the COURT.) Between the 1st of May and the 1st of June— A. 1911. [38]

Q. (By Mr. ERWIN.) At what rate per day?

A. Five dollars per day.

Q. Did you receive any money on account of your labor? A. No.

Q. Who were you working for at that time?

A. Ed Jern.

Q. In what capacity was Ed Jern on that claim? Do you know? A. Beg pardon.

Q. In what capacity he was working there, or in possession of it?

Mr. FRAME.—We object as irrelevant, incompetent and immaterial.

A. As a layman is what I understood it.

The COURT.—It is competent for him to tell what he knows.

Q. (By Mr. ERWIN.) Do you know in what capacity?

A. He was working as a layman.

(Testimony of Algot Gustafson.)

Q. What work were you performing on the claim at that time?

A. I was working in the boiler-house most of the time.

Q. I mean, between the 1st of May and the 1st of June.

A. That was the time. When any work had to be done in the boiler-house I was working there. Between times I would help the boys out.

Q. What work were you doing in the boiler-house?

The COURT.—I cannot tell from your testimony what kind of work you were doing there.

A. Your Honor, you see, at that time of the year we were thawing the dump and getting ready for to sluice the dump. In the meantime we were fixing up for the drifting, preparing for the work in the summer. When we had fire in the boiler thawing the dump I was working in the boiler-house.

Q. What were you doing in the boiler-house; sharpening picks, or what?

A. Running the hoist and firing the boiler. When there was no [39] work to do in the boiler-house, I went out and worked at whatever I was told had to be done.

Q. (By Mr. ERWIN.) What would that work consist of, outside the boiler-house?

A. It was sluicing up the dump, and fixing up the ditch, and such a thing.

Q. Were you ever underground?

A. Not at that time.

Q. You say you never did any work underground?

(Testimony of Algot Gustafson.)

A. No, sir.

Q. How much did you pay for filing this lien?

A. I can't remember now what I paid.

Q. You say in your complaint that you paid \$3.70.
Is that right? A. I think that is correct.

Q. You say also in your complaint that \$50 is a reasonable attorney's fee to be allowed the attorney for the preparation of the claim of lien. Is that—

Mr. FRAME.—(Interrupting.) We object, as the witness is not shown to be competent.

The COURT.—Objection sustained.

Q. (By Mr. ERWIN.) You know the other lien claimants that are mentioned here, Thomas Wright, Gus Honk, Knute Peterson, Carl Strass and Victor Anderson?

A. Yes, sir.

Q. You have assignments of their claims of lien, have you not? A. Yes.

Q. I hand you that paper, and ask you what that is. (Hands same to witness.)

A. That is a bill of sale.

Q. Is it an assignment of the lien? What is it a bill of sale of? A. From Thomas Wright. [40]

Mr. ERWIN.—You admit the assignment?

Mr. FRAME.—Yes.

The COURT.—It is admitted by the attorney for the defendants that the claims mentioned in the complaint were duly assigned to plaintiff. Proceed.

Q. (By Mr. ERWIN.) Mr. Gustafson, the work that you performed on that claim during the time for which you claim a lien—what would you say as to

(Testimony of Algot Gustafson.)

the nature of the work, whether it was development, improvement work, that would enhance the value of the claim.

Mr. FRAME.—We object to that in the first place because it is leading, and in the second place because it calls for a conclusion of the witness. Let the witness state what he did.

The COURT.—I will state to the attorney for the plaintiff, that you can go into detail as to the class of work they did, and then I will be able to determine whether it tended to develop the property.

Q. (By Mr. ERWIN.) Do you know what the nature of the work was that was carried on there on that claim during the time you were on the claim? When did you say you went on the claim?

A. The 14th of November.

Q. Just state to the Court what the work consisted of that was carried on from the 14th of November on that claim while you were there?

Mr. FRAME.—To which we object for the reason that it is immaterial and irrelevant, not being work that is claimed for in their liens.

Mr. ERWIN.—He testified he went on the claim on the 14th of November.

The COURT.—The point I want to be informed about is the dates these lien claimants worked there.
[41]

Mr. ERWIN.—I would like to be able to show that some of these laborers worked there right along and were paid up to a certain date.

The COURT.—I want the dates of their liens.

(Testimony of Algot Gustafson.)

We do not care for the time they worked and were paid for.

Mr. ERWIN.—But, leading up to whether this work was development work or simply mining, I would have to go back of the time perhaps.

The COURT.—If I find that that is necessary to inform the Court, I will allow you to do it, but at first blush I do not think it will be.

Mr. ERWIN.—This witness has filed a lien for work done between the 1st of May and the 1st of June.

Q. Do you know what the general work was between the 1st of May and the 1st of June on that claim, what it consisted of, what the laborers were doing on the claim?

A. They were sluicing up the dump and fixing up the ditch, and fixing up a new shaft for the new hole.

Q. Was there any drifting or excavating going on underground at that time, if you know?

Mr. FRAME.—We object as leading.

(Objection overruled, and defendants except.)

A. Not that I know of.

Q. (By Mr. ERWIN.) When was this dirt taken out that you were sluicing at that time?

A. It was taken out before that time.

Q. During what period was it taken out?

A. During the whole winter.

Q. During the winter were they doing mining, excavating, and running abreast underground, if you know? A. They were.

Q. From the first of the winter to the first part of

(Testimony of Algot Gustafson.)

March? A. Yes. [42]

Q. Where was that work being carried on?

A. On the lower end of the claim.

Q. And this dump of dirt that you say you were sluicing during the month of May—where did that dirt come from, what part of the ground?

A. It both came from the same part, but it was two blocks; one block was worked out, and the other one was opened up by sinking a shaft and driving tunnels, and that was dumped into the same dump.

Q. You say they opened up a new block of ground?

A. Yes.

Q. Do you remember what date they started to open up that new block?

A. I couldn't say the date, but it was in February.

Q. Had they finished the old block of ground at that time, no more work done on the old block?

A. No, there was no more work done after the last part of February on the old block.

Q. And in February they began to open—

A. (Interrupting.) In March.

Q. In March they began to open up new ground?

A. New ground, yes, sir.

Q. What did the work consist of, in opening up that new ground?

A. Sinking a shaft and driving tunnels, from what I understood. I wasn't working down in the ground, but was running the hoist.

Q. You saw and knew what they were doing?

A. Yes.

Mr. FRAME.—He couldn't see underground, and

(Testimony of Algot Gustafson.)

we object to this.

The COURT.—Sustained. Just tell us what you saw and what you knew. [43]

Q. (By Mr. ERWIN.) Did any of the defendants tell you what they were doing underground at that time?

Mr. FRAME.—We object to this as immaterial, incompetent and hearsay.

A. All I can say is that they told me they were driving the tunnels. That is all I know.

Mr. FRAME.—I move that that be stricken.

The COURT.—Motion granted, unless the defendants themselves told him that, in which case it would be different, because it would be an admission.

Q. (By Mr. ERWIN.) Have you a time check?

A. Yes, sir.

Q. For your work? (Witness produces a paper.)

Q. What is this paper that you have produced? Read it. Will you (to Mr. Frame) admit that?

Mr. FRAME.—We object to it as immaterial. Did you (to Mr. Erwin) wish to offer it in evidence?

Mr. ERWIN.—I offer it in evidence, as a time check showing—

Mr. FRAME.—(Interrupting.) It is not confined to the time he claims his lien for. It is not for any particular work.

The COURT.—Let me see it. (Court examines same.)

Mr. ERWIN.—I asked him if that covers the time for which he claims a lien.

(Testimony of Algot Gustafson.)

The COURT.—It may be admitted in evidence.

(Marked Plaintiff's Exhibit "F.")

(Mr. Erwin reads Exhibit "F," as follows: "Wolf Creek. June 7, 1911. I hereby promise to pay to A. Gustafson 29 days and 5 hours at the rate of five dollars (\$5) a day. Ed Jern.")

Mr. ERWIN.—That is all.

Mr. FRAME.—No cross-examination. [44]

[Testimony of Gust Honk, for Plaintiff.]

GUST HONK, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ERWIN.)

Q. You filed a claim of lien against Jesse Noble, Ben Boone, Luther C. Hess and Ed Jern, did you not? A. Yes.

Q. Do you remember what work that was for and during what period? Can you testify without seeing the lien? A. Not exactly.

Q. I will ask you if that (handing paper to witness) is the notice of lien that you filed at that time?

A. That is my name.

Q. That is your signature on that? A. Yes.

Q. Tell the Court what work you performed on that claim, and how much, and during what time.

A. How much is pretty hard to state. A man does all he possibly can in a place like that.

Q. When did you begin to work there?

A. The 25th of April, 1910.

Q. When did you cease work?

(Testimony of Gust Honk.)

Mr. FRAME.—We object—

The COURT.—Proceed.

Q. (By Mr. ERWIN.) When did you cease work?

A. I couldn't remember exactly, but about the first of June, I think, 1911.

Q. Were you paid for all that work?

A. No, I wasn't.

Q. For what portion of that time were you not paid?

A. I couldn't tell exactly. I was paid a certain amount, and the balance is due me yet.

Q. You say in your notice and claim of lien that 8 days and 9 hours' work and labor were performed by you? [45] A. Exactly.

Q. Is that right? A. Yes, that is right.

Q. You were not paid for the 8 days' and 9 hours' labor? A. That is correct.

Q. That amount was due you when you ceased work? A. Yes, when I quit work.

Q. At what rate were you working there?

A. \$7.00 a day and board.

Q. Who hired you to work?

A. Ed Jern. In the first place, Charley Erickson hired me.

Q. Who was Charley Erickson?

A. He is right in the courthouse all right now.

Q. What was he doing there?

A. He had a lay on the ground at the time, and I was working for him.

Q. How long did you work for him; until what

(Testimony of Gust Honk.)

date? A. Until the day he sold the ground.

Q. When was that?

A. I believe the last payment came due the 2d of September.

Q. Who bought the ground?

A. Ed Jern; not the ground, but he bought his lay.

Q. And you continued to work right on?

A. Yes, I did.

Q. You say in your notice and claim of lien that the sum of \$62.50 is due you? A. Yes, sir.

Q. That is still owing to you? A. Yes.

Q. What labor were you doing on that claim between the 16th day of May and the 1st day of June, during the time you claim a lien? [46]

A. Well, I was working all right. But the most of the time I was running the boiler, fixing up cribbing for the summer shaft and I was also on the dump.

Q. Can you segregate the time that you were working on the cribbing for the summer shaft?

A. No.

Q. Do you know how many days you worked at that? A. No, I couldn't say exactly.

Q. About how many? What proportion of the time?

(Mr. Frame objects. Objection overruled.)

A. I was picking out the cribbing, sawing them and cutting them out. I guess it would take five or six days perhaps.

Q. I would like you to be sure about that if you can, just what time you performed that class of labor.

(Testimony of Gust Honk.)

A. That is pretty hard for a man to tell when he is working like that.

Q. What other work did you do there?

A. I would go up on the ditch and fix the ditch once in a while, so that the boys could keep on sluicing right along. They were sluicing at the time.

Q. In what capacity were you working at the mine? A. As foreman.

Q. Where did the dirt that was in this dump come from, if you know?

A. Yes, I know that, when I was underground.

Q. Where?

A. The biggest part of it came from the lower block that we took out during the winter, and a part of it from the shaft we were opening up for the summer work.

Q. Do you know when the work was begun on the shaft for the summer work?

A. Yes. We pulled out the tools from the lower shaft on the 8th of March. I paid particular notice of that. [47]

Q. Then, what did you do after the 8th of March?

A. We started in the work in the upper shaft, driving tunnels and fixing up for the summer work.

Q. What did that work consist of?

A. Sinking the shaft, driving the tunnel, and timbering up the tunnel.

(Mr. Frame objects. Objection overruled.)

Mr. ERWIN.—I want to show where the dirt in this dump came from. Q. What was that work; was that development work or mining?

(Testimony of Gust Honk.)

A. That is what I consider development work; when you open up a mine like that.

Q. Was it a new block of ground?

A. Yes, it was.

Q. How far did you get with that work before you quit working underground?

A. Well, we were just about close to 100 feet on each side with the tunnel from the shaft. We drove one tunnel upstream and one downstream, and we were close to 100 feet each way. We measured it, and I think it was 97 feet, if I am not mistaken.

Q. (By the COURT.) Do you mean that you drove the tunnels that far, or worked that far?

A. No, sir, we run the tunnels.

Q. You just had a tunnel that far each side of the shaft? A. Yes.

Mr. FRAME.—I think this work was all done before the time of these liens.

Mr. ERWIN.—I think it was.

Mr. FRAME.—We object to it as irrelevant, incompetent and immaterial.

The COURT.—I will listen to it.

Mr. FRAME.—We except. (Exception allowed.)

[48]

Q. (By Mr. ERWIN.) You were in charge of that work, were you— A. Yes, I was.

Q. (Continuing.) —underground? A. Yes.

Q. What became of the dirt that you took out at that time; what did you do with it?

A. We put it in the dump.

Q. Was it pay-dirt? A. Why, sure.

(Testimony of Gust Honk.)

Q. Were you in pay all the time?

A. Yes, with the exception of the last two feet on the upstream tunnel we were out of the pay there, because I think we got a little too far up towards the hill; otherwise, there was pay in the balance of it.

Q. Did you open up breasts at each end of the tunnel? A. No, we didn't.

Q. State what was the condition of the shaft and tunnels when you ceased work underground.

A. They were in good shape, all of them.

Q. Was the shaft cribbed?

A. No, it was not, but the tunnels were timbered pretty near close up to the furthest end.

Q. How long have you been mining?

A. Well, I have been in Alaska for the last nine years.

Q. Have you been carrying on mining during that time? A. At all times.

Q. Did you mine before you came to Alaska?

A. Yes, I did.

Q. What kind of mining?

A. Iron ore mining. [49]

Q. Will you state to the Court what the work was in this new block of ground that you say you were opening up, whether it was actual mining—what you consider actual mining—or was it development work in the nature of improving the mine?

Mr. FRAME.—We object, as calling for a conclusion of the witness, and for the further reason that the testimony should be as to what was done during the period for which the lien is claimed.

(Testimony of Gust Honk.)

(Objection overruled. Mr. Frame excepts; exception allowed.)

A. I consider that when a man sinks a shaft and drives tunnels like that, that it is development work and an improvement on the ground.

Q. (By Mr. ERWIN.) I would ask you if that work enhanced the value of the mine and would be of value to the owners of the claim in the work to be carried on later.

A. Why, I can't see the reason why it shouldn't, because we all know it takes a little money and time to open up a mine.

Q. It was necessary in doing that work to take out dirt and hoist it as you did hoist it, was it not?

Mr. FRAME.—We object to this line of examination. Let the witness testify. This is leading.

(Objection overruled. Mr. Frame excepts; exception allowed.)

Q. (By Mr. ERWIN.) It was necessary to take that dirt out, to hoist it and put it in the dump?

A. Why certainly.

Q. During the time for which you have filed your claim of lien, from the 16th of May to the 1st of June, was there any other work that you were doing there besides what you stated to the Court?

A. Yes. Lots of times in a dump like that it is hard to thaw the dump, and you are liable to find some frost in the dump; and, to be able to go ahead with the sluicing, you might have to thaw [50] that particular frost. And perhaps I helped Mr. Gustavson. He had charge of the steaming depart-

(Testimony of Gust Honk.)

ment, and for five and ten minutes I might help him put in a few points, and get that particular frozen point thawed so we could go ahead with the work.

Q. Did you do any other work, with reference to getting the mine ready for summer work, during that time?

A. No, not with the exception I told the Court of a while ago, that I was fixing up some cribbing for the new shaft we had been sinking.

Q. You fixed up cribbing for the new shaft?

A. Also we fixed the mast there. That is standing there to-day I think fixed and prepared for summer work.

Q. Tell the Court about that.

A. During the winter we happened to break the mast, and Mr. Anderson and I—he was one of the boys working there—we spliced the mast and tightened up the cables to be ready for summer work.

Q. How much time did you put in on that work?

A. Perhaps a little more than a day.

Q. Was that during the time for which you claim a lien here?

A. No. This was just a few days before we filed this lien.

Q. Just a few days before you filed the lien?

A. Yes.

Q. Was it during the time, from the 16th of May, to the 1st of June, 1911? A. No, it was before.

Q. You think it was before that time?

A. Yes. I think it was before that time.

Q. You say you were putting that mast in position

(Testimony of Gust Honk.)

to be used in the summer? [51]

A. Well, I certainly did, and they used it too, and it is standing there right to-day I believe, if it has not been taken down in the last few weeks or so. I was up there either the 3d or 10th of March, and it was standing there yet in the same place.

Q. You have assigned your claim of lien to Mr. Gustafson, have you not? A. Yes, I have.

Q. Did you ever see any notices posted on that claim? A. Not at any time.

Q. Do you know whether any notices were posted there?

A. No, I never heard any talk about it before this came up here in court. Neither Charles Erickson or Ed Jern ever mentioned to me about any notices.

Mr. ERWIN.—That is all.

Cross-examination.

(By Mr. FRAME.)

Q. You say you saw no notices posted there on the claim? A. No.

Q. You worked for Charles Erickson?

A. Yes, I did.

Q. (Continuing.) During the time he had a lay?

A. Yes.

Q. Didn't he ever call your attention to a notice which was posted on the upper end of that claim?

A. No. He never did.

Q. Isn't there a center stake which is a very short distance from where you passed daily?

A. Yes, sir.

Q. Didn't you, in the summer of 1910 at the time

(Testimony of Gust Honk.)

Charles Erickson was in possession of that ground working it, see him post a notice on that ground?

A. No. I didn't. [52]

Q. You never heard him tell you or heard him say anything to anybody that there was a notice there to the effect that the owners of the claim wouldn't be responsible for the debts contracted by the laymen? A. No.

Q. You never did? A. No.

Q. You are absolutely sure? A. Yes, I am.

Q. If there had been a notice there, you could have easily seen it from the path along there?

A. I can't see the reason why I shouldn't.

Q. You could have easily seen it if there was one?

A. If there was any there, yes.

Q. Did you ever go up and examine that stake?

A. No, I wasn't so close up as all that.

Q. How far is it from the path to the stake?

A. From the trail where we used to pass by it is—

Q. (Interrupting.) Twenty or thirty feet?

A. No, it is not that; perhaps fifteen feet, if it was that.

Q. It is out in the open where you can see it.

A. Yes, it was open. That is the center stake on the side claim.

Q. The center stake on No. 2 creek claim.

A. There can be two center stakes, can't there?

Q. I am talking about this claim, No. 2 above on the creek. A. Yes.

Q. The upper center stake of No. 2 above.

A. I thought you meant the center stake on the

(Testimony of Gust Honk.)

side between the bench and the creek claim.

Q. No. You are mistaken. I say the upper center stake of No. 2 creek claim.

A. I never saw that stake.

Q. You passed by that stake quite frequently?
[53]

A. When I walked up the ditch, but I never seen that stake.

Q. You are absolutely sure you never saw that stake? A. Yes.

Q. Do you know whether there is a stake there or not?

A. No, I couldn't tell you. I thought you were talking about that one on the sidehill between the bench and the creek in the first place.

Q. You say you went to work there on the 1st of April, 1910?

A. About the 25th of April, 1910.

Q. You worked there until about the 1st of June, 1911? A. The first part of June.

Q. On the 14th day of May, 1911, you were paid in full for all work you had done up to that time?

(Mr. Erwin objects as immaterial; overruled.)

A. I am not quite certain of that.

Q. Didn't Mr. Jern on that day give you a check for \$1,313? A. Yes.

Q. Is that your writing there? (Handing paper to witness.) A. Yes.

Q. It was in full, wasn't it? A. What?

Q. You were paid in full for all the work you had done on that claim up to the 14th day of May?

(Testimony of Gust Honk.)

A. At that time?

Q. This check made payment in full, didn't it?

A. I didn't understand anything to that effect.

Q. Didn't this check on the 14th day of May pay everything that was coming to you from Mr. Jern on that date?

A. That is the question I am not quite certain about. I don't remember that we ever spoke that it was pay in full.

Q. Didn't you know whether it was payment in full or not? A. No. [54]

Q. You know whether he owes you any other money besides what you claim for here in this lien?

A. No, he doesn't.

Q. This check which he gave you on that date paid you everything that was coming to you for the work you had done on number 2 above?

A. I wasn't quite sure about that. He never said anything about that.

Q. Don't you know?

A. He paid me for certain work, but how much it was he never said. Whether it was in full for the work I did, I couldn't say.

Q. It was for work you did on that ground?

A. Yes, during the winter.

Q. During the winter and before that?

A. No. I was paid up before that in the fall.

Q. How much did you get per day?

A. Seven dollars a day and board.

Q. And you got \$1,313.00 on this date, did you not?

A. Yes, I did.

(Testimony of Gust Honk.)

Mr. FRAME.—I offer this check in evidence.

Mr. ERWIN.—I object to it as not tending to prove any matter.

The COURT.—I do not think it does, but I will admit it.

(Marked Defendants' Exhibit 1.)

Q. (By Mr. FRAME.) The only work that you have not been paid for is for the work that you did after the 16th of May on the ground, isn't it?

A. I am not quite certain of that.

Q. That is all that Mr. Jern owes you for, for work out there after the 16th of May?

A. He owes me \$62.50. [55]

Q. For work that you did after the 16th of May?

A. In a way that has got to say that this check is in full?

Q. I am asking you what money he owes you.

A. Sixty-two dollars and fifty cents.

Q. He paid you for all the work you did in opening up this virgin ground that you are speaking about?

A. There was never anything said about any particular work when he paid me the check.

Q. Yes, but he paid you all that was coming to you at that time.

A. I am not quite certain of that.

Q. (By the COURT.) Are you acquainted with the boundaries of Number 2, the claim you were working on? Do you know where the stakes are?

A. Not all of the stakes.

Q. What stakes do you know?

(Testimony of Gust Honk.)

A. I know where the both side stakes are up towards the bench.

Q. Don't you know the upper and lower end stakes of the claim?

A. Yes, and there is one in the center also between the bench and the creek.

Q. Are there three stakes on the upper end of the claim, and three on the lower? A. I couldn't say.

Q. Are you familiar with either the upper end of the claim or the lower end, other than the sides? Tell me what you do know about the stakes on the claim.

A. All I know about the stakes are the three stakes; one in the corner between the bench and the creek, also the center one between the bench and the creek, and also the upper one.

Q. Did you ever go up and down, to the upper end stake of the claim or the lower end stake, ever have occasion to pass by them?

A. No, not the center ones. [56]

Redirect Examination.

Q. (By Mr. ERWIN.) By "center stake" you mean the stake on the side of the claim?

A. What I know about, yes. But I don't know anything about the stakes on the end between 1 and 2 creek claim, and between 2 and three creek claim.

Q. How long is that claim?

A. I couldn't say, because I never measured it.

Q. Is it a twenty acre claim?

A. It is supposed to be 1,320 feet, I suppose. That is all I know about it.

(Testimony of Gust Honk.)

Q. On what portion of that claim were you working?

A. Just about in the center, I should think, the first part of the winter, and the latter part of the winter we came closer up to the upper end.

Q. Was the claim covered with any undergrowth, or was it clear of brush?

A. No, not so very. There was a little bit here and there.

Q. How was it at the lower end and the center of the claim?

A. There is brush there, more or less of it.

Q. Could a stake be seen at any great distance at the lower end of the claim and the center of the claim?

A. No. If it would, it seems to me I would have been able to see it when I was there on the ground about thirteen or fourteen months.

Q. Did the trail going to and fro from the claim pass anywhere near the center portion of the lower end of the claim? A. No.

Q. Where was the trail?

A. The main road was about five hundred feet from where the center stake should be, somewheres around there.

Q. Does the trail go past or near any of the stakes?

A. Yes, the stakes between the bench and the creek, the trail goes right alongside of all three stakes there. [57]

Q. How close does the trail go to those stakes?

A. From the lower corner it must be about 25 or

(Testimony of Gust Honk.)

30 feet, perhaps a little more, and the center one is something around 15 or 20 feet, and the upper one is about 35 or 40 feet, I should think.

Q. And you say you don't know where the stakes were in the end of the claim, the center stakes?

A. No.

Q. You never saw them? A. No.

Mr. ERWIN.—That is all.

Recross-examination.

(By Mr. FRAME.)

Q. You were foreman out there, were you not?

A. Yes, sir.

Q. Mr. Jern, during the month of May, was sluicing up a dump, was he not? A. Yes.

Q. A dump he had taken out the winter before?

A. During the winter, yes.

Q. And you were looking after the sluicing and the cleanups, among your other duties?

A. Yes, and the workings in general.

Q. And the workings in general? A. Yes.

Mr. FRAME.—That is all.

Mr. ERWIN.—That is all. [53]

[Testimony of Thomas Wright, for Plaintiff.]

THOMAS WRIGHT, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ERWIN.)

Q. Your name is Thomas Wright?

A. Yes.

Q. You are one of the lien claimants in this action?

(Testimony of Thomas Wright.)

A. Yes, sir.

Q. You are one of the claimants who assigned his claim of lien to Algot Gustafson, the plaintiff?

A. Yes, sir.

Q. I would ask you whether or not that is the lien that you filed or caused to be filed (handing paper to witness). Is that your signature? A. Yes, sir.

Q. You signed this? A. Yes, sir.

Q. Is that the notice of lien?

A. I didn't read it all yet.

Q. Does that contain a true statement of the work you performed out there for which you claim a lien?

A. Yes, from the 1st of April to the 8th day of June. That is the days I worked. I went to work the 1st of April.

Q. Who hired you to work? A. Ed Jern.

Q. In what capacity were you working?

A. I was cooking for the men and for Jern.

Q. At what rate? A. Five dollars a day.

Q. Was that agreed upon?

A. That is what he paid me, \$5.00 a day. He paid me one month. That is what my wages were to be, \$5.00 a day.

Q. You haven't been paid for the work you performed between the 1st of April and the 9th day of June? [59]

A. I have been paid for thirty days.

Q. How much is due you?

A. He paid me up to the last of April, and I worked the month of May and up to the 8th of June.

Q. From what date?

(Testimony of Thomas Wright.)

A. I have got coming to me from the 1st of May up to the 8th day of June; that is, as I recollect, it was on the 8th day of June that I quit.

Q. You went there to work on what date?

A. 1st of April.

Q. And you worked continuously until what date?

A. I was away three days, and I asked Mr. Jern if I could put a man in my place at the same wages, and I hired a man and put him in and he said it was all right, and I paid the man myself and went on.

Q. How much were you paid?

A. I was paid for thirty days, at \$5.00 a day, and it amounted to \$150.00 and he gave me a check for it.

Q. How much does that leave due for your work?

A. It leaves up to the 8th of June. I think it amounts, as near as I recollect, to \$190, at \$5.00 a day. That is as close as I can figure it. It is from the 1st of May—he paid me for the month of April—and I have from that to the 8th of June coming to me.

Q. You assigned your claim of lien to Algot Gustafson?

A. I assigned it over to him. I worked one day for Mr. Noble and he paid me for that day, but that wasn't put in here.

Mr. ERWIN.—That is all.

Cross-examination.

(By Mr. FRAME.)

Q. What are you doing now?

A. I am not doing anything. I had a restaurant.

[60]

Q. Whereabouts?

(Testimony of Thomas Wright.)

A. In Chatanika. I had a restaurant there this winter.

Q. There were several outfits at work upon this claim No. 2 Above Discovery, in May?

A. Yes, I guess there was more than one. Mr. Jern worked there anyway.

Q. Mr. Anderson had a lay on a portion of this No. 2? A. I understood he had.

Q. (Continuing.) Charles or John Anderson?

A. I understood he had a lay.

Q. (Continuing.) And Victor Wren. Those three men had a lay?

A. I know the three boys, but I don't recall their names.

Q. During the time you were cooking for Mr. Jern and his men, you were also cooking for Mr. Wren and his men?

A. Mr. Jern hired me to cook for those men and never mentioned anything like that, and I wasn't working for those men. I was working for Mr. Jern.

Q. You had no contract for or with them?

A. I don't know what contract he had with them, and I never seen no contract. I was working for Mr. Jern.

Q. What work were the men doing on No. 2 during May?

A. I was the cook, and I can't tell you much about the mining part of it. I know I passed up the ditch, and a good deal of the time they were improving the ditch to keep it from tearing out. It was tearing out. I know that part of it. And I saw Mr. Honk making

(Testimony of Thomas Wright.)

timbers for the shaft.

Q. How do you know it was for the shaft?

A. He told me he was making timbers—

Q. (Interrupting.) The men were sluicing up the dump that had been taken out by Mr. Jern?

A. They were working on the dump, certain men.

Q. That is where Mr. Jern got the money to pay you with, from the cleanups? [61]

A. He didn't pay me.

Q. He paid you some?

A. He paid me \$150. He gave me one check.

Q. And they had to keep this ditch in repair so that the water could be carried onto the claim?

A. I supposed they would keep the ditch in repair to use the water. At any rate, they kept it from tearing out and ruining the whole ditch. That is my idea. I am not a miner.

Mr. FRAME.—That is all.

Redirect Examination.

(Mr. ERWIN.)

Q. Do you know when sluicing began there?

A. I heard the boys say. I didn't know exactly, but I heard them say. I think it began some time in April. I couldn't name the day, but I think it was in April they started, or close to the first of May. I was cooking and didn't pay no attention to the mining at all, only just what was said.

Q. You were working there before sluicing began?

A. Yes, I worked there from the 1st of April.

Q. Do you know whether or not any notices were posted on the ground?

(Testimony of Thomas Wright.)

A. No, I never seen any.

Q. (Continuing.)—Limiting the liability of the owners?

A. I never seen any notices myself, and I didn't look for any, and I couldn't say whether there were any or not. I never seen them. I don't know where the stakes are, or anything about the claim, except I think Mr. Noble and I saw one stake, went to one stake one day, but I didn't see no notice.

Q. What stake would that be?

A. I couldn't say whether that was a stake on that claim. It fell down one day outside of the cook-house, and I think Mr. Noble and I walked over to it, but I don't know whether that is the same stake that belongs to that claim. [62]

Q. Was it ever discussed between the workmen there as to whether there were notices posted?

A. I couldn't tell you. I never heard any of the boys speak a thing up to the time of the lien about notices, or anybody outside of Mr. Jern, and I think I heard him one time in the mess-house. He was eating there later than the rest of the boys, and I think I heard him make a remark something about if he didn't pay out that the claim was responsible when there was no notices up. As near as I understood, that was the words I heard him say.

Q. (By Mr. FRAME.) Who said that?

A. I think I heard Mr. Jern. I couldn't say exactly the words, but I think I heard him make that remark.

(Testimony of Thomas Wright.)

Mr. FRAME.—I move that the answer of the witness be stricken.

The COURT.—That part of it which refers to what Mr. Jern said, which is not responsive to the question, may be stricken: The question was, whether any notices had been posted, or whether it was discussed between the men.

A. I didn't hear any of the men talk about notices. I just heard Mr. Jern make those remarks. And I really couldn't tell you whether he meant that claim. I heard him in a conversation say that he thought the claim owners were responsible for the wages when there was no notices up, but whether he meant that claim or not I couldn't—

The COURT.—Never mind that.

Q. (By Mr. FRAME.) The cook-house is not on No. 2 Above Discovery? A. I can't tell you.

Q. You don't know?

A. I know where it is, but I can't tell you where the stakes are.

Q. You don't know whether it is on 2 Above Discovery, creek claim, or not? [63]

A. The cook-house—I couldn't say whether it is on the same claim they were working on, but it is right next to those boys that were working there. I couldn't say that, because I don't know about that.

Q. (By Mr. ERWIN.) You were working for Ed Jern. A. Ed Jern hired me.

Q. You were cooking for the laborers hired in that mine.

A. I was cooking for the men that were eating at

(Testimony of Thomas Wright.)

that boarding-house. All the men that ate there, I was cooking for them.

Q. Did Algot Gustafson, Victor Anderson, Knute Peterson and the other claimants here board at the mess house where you were cooking?

A. Gustafson did, yes, sir.

Q. Did Victor Anderson?

A. Yes, Victor did. I get their names mixed up. I know them by sight, but I get their names mixed.

Q. Do you know whether they were working for Ed Jern at that time?

A. Yes, they said they were working for Ed Jern.

Mr. ERWIN.—That is all.

Mr. FRAME.—That is all.

(Here a recess is taken until 2 P. M. to-day.)

April 1st, 1912, 2 P. M.

[Testimony of Victor Anderson, for Plaintiff.]

VICTOR ANDERSON, witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ERWIN.)

Q. Your name is Victor Anderson? A. Yes.

Q. You are one of the lien claimants in this case, are you? A. Yes. [64]

Q. You filed a notice of claim of lien for the labor performed out on No. 2 Wolf Creek?

A. Yes.

Q. When did you go to work on the claim?

A. On the 9th of December.

Q. How long did you work there?

(Testimony of Victor Anderson.)

A. To the 1st of June.

Q. Were you paid for your work?

A. Not all of it.

Q. (By Mr. FRAME.) To the 1st of June of what year? A. 1911.

Q. (By Mr. ERWIN.) How much were you to receive per day? A. Five dollars.

Q. Five dollars? A. And board.

Q. Who hired you to go to work? A. Mr. Jern.

Q. What were you doing; what kind of work?

A. I was working down in the mine.

Mr. FRAME.—We object, and we move that all of the testimony of Mr. Anderson be stricken from the record for the reason that it is not confined to any portion of the time for which his lien is claimed. The lien is claimed for work done between the 1st of May and the 26th of May.

The COURT.—I want to hear his testimony.

Q. (By Mr. ERWIN.) Do you remember what time you claim in your notice here that you were not paid for, how many days? A. Twenty-one.

Q. How many days were you not paid for?

A. Twenty-one days.

Q. During what time was that?

A. I was paid up to the 1st of May.

Q. When did you cease work?

A. I didn't cease until the 1st of June.

Q. You say here that you ceased work and labor on the 26th of [65] May. Do you mean to say now that you worked until the 1st of June? A. Yes.

Q. Then this claim of lien is not correct?

(Testimony of Victor Anderson.)

Mr. FRAME.—We object as immaterial.

Q. (By Mr. ERWIN.) You claim 21 days' labor?

A. Yes.

Q. At \$5.00 per day? A. Yes.

Q. And you claim there is now due you \$105? Is that correct? A. Yes.

The COURT.—The thing I would be particular about now is whether in that 21 days he claims anything between the 26th of May and the 1st of June, or whether he did all that 21 days' work before May 26th.

Q. (By Mr. ERWIN.) Did you do the 21 days' work and labor you claim here, between the 1st of May and the 26th of May, 1911?

A. I was working until the 1st of June.

Q. (By the COURT.) Have you an account-book so you can tell us what days you worked in May?

A. Yes.

Q. Let us know when you did your work. (Witness produces book.) Tell us the days you worked, if you have it in your book, the days you worked in May, 1911.

Q. (By Mr. ERWIN.) Have you got the time down there? A. Yes.

Q. Tell the Court what days you worked in May.

A. I worked the 1st, and the 2d, 3d, 4th, 5th, 6th, 7th and 8th. Then, I worked 8 hours on the 9th, and 2 hours on the 10th. And I worked the 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th; on the 26th I had 5 hours, and on the 29th 5 hours. On the 30th a full day and the 31st. [66]

(Testimony of Victor Anderson.)

Q. The 30th and 31st? A. Yes.

Q. Were you paid for the day's work you did on the 31st? A. No.

Q. You were not paid for any work you did after the 26th. A. No. I was paid up to the 1st of May.

Q. How does it happen that you put your time in that you ceased work on the 26th day of May, when you worked until the 31st, as you say now. How did that mistake happen? A. I don't know.

Q. Did you have your book there when you were giving your time? A. No.

Q. Have you a time check?

A. Yes, a time check.

Q. Let me see your time check. (Witness produces paper, and hands to Mr. Erwin.) Who gave you this time check? A. Ed Jern.

Q. Did he give it to you on the day it is dated, June 7th? A. Yes.

Q. What work were you doing on that claim from the 1st of May until the 26th of May?

A. I was sluicing the dump in, and fixing up the ditch.

Q. How much of the time did you put in sluicing the dump? Can you tell what days you were working on the dump, and what days you were working on the ditch?

A. We did work on the ditch—it would have a break-out and we would have to go up and fix it; then we would sluice again.

Q. About how much time would you be working on the ditch, can you tell?

(Testimony of Victor Anderson.)

A. That is pretty hard to tell how much time I did put in on the ditch exactly. [67]

Q. Can you tell approximately how much time; give the Court any idea of how many days?

Q. (By the COURT.) Did you work one day on the ditch?

A. Yes, I have been working one day on the ditch.

Q. Two days?

A. I worked about five or six days I guess.

Q. How many days did you go up there? Was it just five or six times?

A. I was up and around there—

Q. About how many times did you go up there to do the five or six days' work on the ditch? Did you go up and work an hour or two at a time, or did you put in an entire day?

A. I was working there an entire day too sometimes.

Q. (By Mr. ERWIN.) Can you tell what day that was? Have you any memorandum in your book telling what days you worked on that?

A. No, I didn't mark anything like that down.

Q. You say you were there during the winter workings? A. Yes, I was there during the winter.

Q. Did you work underground? A. Yes.

Q. What work were you doing during the winter?

A. I was running a wheelbarrow most of the time.

Mr. FRAME.—We object to this line of testimony as immaterial and move that the answer be stricken.

The COURT.—I will allow it to stand.

(Mr. Frame excepts; exception allowed.)

(Testimony of Victor Anderson.)

Q. (By Mr. ERWIN.) Where was this work being done on that claim, that is, the latter part of the season that you were working?

A. The latter part of the season I was working there sinking a hole and driving tunnels.

Q. Was that new ground that you were opening up? A. Yes. [68]

Mr. FRAME.—I wish it understood that our objection goes all the way through to this line of testimony.

The COURT.—You wish an objection to all testimony given by this witness that is not covered between the 1st of May and the 26th of May?

Mr. FRAME.—Yes.

The COURT.—Exception allowed.

Q. (By Mr. ERWIN.) You were taking out the dirt and gravel and hoisting it during that time from this work, were you? A. In May?

Q. Yes. A. Not in May.

Q. During the time you were improving and opening up that ground, you were putting the dirt in a dump? A. Yes.

Q. And that was the dirt you were sluicing up?

A. Yes.

Q. Between May 1st and May 26th? A. Yes.

Q. Was there any other work that you did around there than sluicing and fixing and repairing the ditch? A. I was fixing up the gin pole.

Q. Fixing a gin pole? A. Yes.

Q. How much time did you devote to that work? How long did it take you to put up the gin pole?

(Testimony of Victor Anderson.)

A. We just braced the gin pole.

Q. How long did it take you?

A. About half a day.

Q. When was that work done?

A. That was in April.

Q. That wasn't done between the 1st and 26th of May? A. No. [69]

Q. Tell the Court if there is any other kind of work that you did there, between the 1st of May and the 26th of May especially. Did you crib any shaft during that time? A. No.

Q. Did you make any cribbing?

A. I did saw some cribbing.

Q. When did you do that? A. In May.

Q. How long were you sawing cribbing? (No answer.) Can't you tell us approximately how long you were at work sawing—cribbing?

Q. (By the COURT.) Were you two hours?

A. I think I was about half a day.

Q. (By Mr. ERWIN.) What was that cribbing to be used for, if you know? A. For the new shaft.

Q. Do you know whether it was put in the shaft? Was it put in place in the shaft? A. Then?

Q. Yes. A. No.

Q. Did you leave it there on the ground where you were working sawing it? A. Yes.

Q. Was there any other work that you performed during that time that you have not told us of? (No answer.)

Q. Do you recollect any other work?

A. No, I don't think, at that time.

(Testimony of Victor Anderson.)

Q. Now, you say you worked about five days on the ditch—is that your testimony—repairing the ditch? A. I guess close to that.

Q. Altogether about five days? A. Yes.

Q. That is right, is it? [70]

A. That is as close as I can figure it. It is pretty hard to tell within an hour or so.

Q. And about half a day bracing the gin pole?

A. Yes.

Q. Was the gin pole in use at that time?

A. No, but they could use it in the summer.

Q. What were they fixing the gin pole for?

A. For the new place for the summer work.

Q. They were fixing that up for when they should begin to hoist and take out gravel again? A. Yes.

Q. How many days did you say you were sawing cribbing? A. Half a day.

Q. Now, you want the Court to understand that there were six days of this time that you were engaged in other work than sluicing the dump?

A. Yes.

Q. This sum of \$105.00 is still due you, is it, that you claim here? It has not been paid. A. No.

Q. And have you assigned this claim to the plaintiff Algot Gustafson? A. Yes.

Q. Mr. Anderson, did you ever see any notice posted on that claim, that the owners would not be liable for labor? A. No, sir.

Mr. ERWIN.—That is all.

(Testimony of Victor Anderson.)

Cross-examination.

(By Mr. FRAME.)

Q. How long have you worked as a placer miner?

A. For three years.

Q. How old are you? A. Twenty-six. [71]

Q. And when did you say you went to work on this claim? A. On the 9th of December, 1910.

Q. And you worked there until the 1st of June, or thereabouts? A. Yes.

Q. You stated the work you did in May was done in sluicing the dump and working on the ditch?

A. Yes.

Q. Do you know when this ditch was made? This was an old ditch that had been built there in 1909, wasn't it? A. (No answer.)

Q. You didn't build any new ditch? A. No.

Q. You just fixed the old ditch that was there. As it broke out you would repair it? A. Yes.

Q. (Continuing.) So it would carry the water?

A. Yes.

Q. How many men were working on this ditch from time to time, do you know? (No answer.)

Q. Do you know? (No answer.)

Q. How many men during the month of May, besides yourself were working on this ditch?

A. Working on the ditch?

Q. Yes, to keep it in condition. (No answer.)

Q. (By the COURT.) Did you work there alone when you were working on the ditch? A. No.

Q. Who was with you? A. Mr. Honk.

Q. Anybody else? A. Yes.

(Testimony of Victor Anderson.)

Q. Who else? A. Mr. Gustafson.

Q. Who else? A. Mr. Peterson.

Q. Anybody else?

A. And Gust Anderson. [72]

Q. Anybody else that you remember?

A. Yes, there was Charles—I don't remember his second name, but Charles was his first name.

Q. Were all these men you have mentioned working at the same time you were working on the ditch, or were they working sometimes when you were not up there? A. Oh, yes.

Q. Were they working there all the time you were there? Were they always up there when you were there? A. Not all of them.

Q. (By Mr. FRAME.) Did the ditch cause much trouble that spring? A. Yes.

Q. Was it out of condition? A. Sometimes.

Q. But you people didn't fix it all the time it was out of condition, that is, Mr. Jern didn't. Mr. Jern didn't have it fixed whenever it was out of condition, did he? There were two other outfits that were working on the ground at the same time, were there not? A. Yes.

Q. And they were using the ditch? A. Yes.

Q. When it got out of condition, they sent men down to fix it. Didn't they? Mr. Shon, Mr. Anderson and Mr. Wren; those people sent men down and fixed that ditch when it was out of condition?

A. The rest of them went up there, too.

Q. You don't mean to tell the Court that you are positive that you spent five days down there repair-

(Testimony of Victor Anderson.)

ing that ditch during the month of May, yourself?

A. (No answer.)

Q. Can you answer the question? You don't know for a certainty whether you spent five days down there or not, do you? A. (No answer.) [73]

Q. Can't you answer? (No answer.)

Q. Can't you answer the question?

A. Yes, I guess I did.

Q. You mean to say that you are certain that you spent at least five days down there? A. Yes.

Q. You are certain that you spent at least five days there. It couldn't be any less, but it might be more?

A. I couldn't exactly say within a half hour. We didn't work the whole day steady in one place.

Q. You are sure it was at least five days?

A. Yes.

Q. And there were various other men working on the ditch during this month, quite a number of them?

A. (No answer.)

Q. I would like to have you answer the question.

A. (No answer.)

Q. Can you answer? A. (No answer.)

Q. When did you brace this gin pole? That was in April, wasn't it? A. Yes.

Q. Did you testify that all this dump that you sluiced up in May was taken out of this shaft and tunnel that Mr. Jern sunk in February and March? Didn't you so testify on your direct examination?

A. (No answer.)

The COURT.—Answer the questions, if you can, and if you can't, say so.

(Testimony of Victor Anderson.)

Q. (By Mr. FRAME.) Do you remember? You understand the English language, don't you?

A. Oh, yes; but not very good.

Q. Not very good? A. (No answer.) [74]

Mr. FRAME.—I would like to have these questions answered.

The COURT.—Ask the question a little bit different. Probably he didn't understand it.

Q. Did the dirt that you cleaned up in May all come out of the hole that Mr. Jern put down in March and April, or was there some other dirt from some other place?

A. Yes, there was from two places.

The COURT.—(To Mr. Frame.) Put your questions so he can comprehend them.

Q. (By Mr. FRAME.) The most of that dirt that you sluiced up in May did not come out of this shaft that Mr. Jern put down; it came out of the other place he was working on? A. Sinking?

Q. Yes. A. We were driving tunnels.

Q. When did he start in to run the tunnels?

A. It was in March.

Q. How long did he run? A. Run until April.

Q. Before that he had been taking the dirt out of another place on this ground, had he not?

A. Before that?

Q. Yes, before March. A. Yes.

Q. (By the COURT.) Was the dirt all put in one place? A. Yes.

Q. How much of it out of one place, and how much out of the other?

(Testimony of Victor Anderson.)

A. I don't know how much it was.

Q. Half out of one and half out of the other?

A. No, there was more from one hole. He worked one hole out.

Q. There was more of that that he took out early in the winter before he began driving tunnels?

A. Oh, yes.

Q. Much more? A. Yes. [75]

Q. (By Mr. FRAME.) Early in May, he paid you off for all the work you had done up to the first of May?

A. Yes, I got paid up to the 1st of May.

Q. He paid you for all the work you had done in running these tunnels, didn't he?

A. Well, he didn't say it was for the tunnels.

Q. On the 14th of May, he gave you a check for \$569? A. Yes.

Q. That paid you for all the work you had done up to the 1st of May, didn't it? Wasn't that right? (No answer.)

Q. (By the COURT.) Was that all the money you had coming up to the 1st of May? A. Yes.

Mr. FRAME.—That is all.

Redirect Examination.

(By Mr. ERWIN.)

Q. What was the cause of there being so much labor on that ditch? Why was it that you had to work so much on the ditch, if you know?

A. Well, it had broke out on the sides.

Q. Broke out on the sides? A. Yes.

Q. There were a great many breaks in it, breaks

(Testimony of Victor Anderson.)

occurring frequently? A. Yes.

Q. What kind of ground did that ditch run through, if you know; what I mean is, was it solid ground or a sort of glacial mud, or something of that kind, that would break out easily?

A. There was glacier and mud, I guess.

Mr. ERWIN.—That is all.

Mr. FRAME.—That is all. [76]

[Testimony of Knute Peterson, for Plaintiff.]

KNUTE PETERSON, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ERWIN.)

Q. You are one of the lien claimants mentioned here in this suit? A. Yes.

Q. Your name is Knute Peterson? A. Yes.

Q. You filed a claim of lien on Number 2 Wolf Creek, for labor? A. Yes.

Q. I will ask you if this is the original lien that you signed and filed. (Hands paper to witness.) Is that your signature? A. Yes, that is mine.

Q. When did you go to work on Wolf Creek?

A. I started on the 29th of April, if I am not mistaken.

Q. And when did you cease work?

A. The last of May, I guess, or the 1st of June.

Q. You say here that you performed work and labor from the 29 day of April and ceased said work and labor on the 3d day of June, 1911. Is that right?

A. Yes.

(Testimony of Knute Peterson.)

Q. What rate of wages was you to receive?

A. Five dollars a day.

Q. Who hired you to go to work?

A. Gust Honk.

Q. In what capacity was he working there?

A. He was foreman, and I asked him for a job, and he told me Ed Jern was the layman.

Q. What work were you doing there?

A. I was shoveling in all the time, and fixing up the ditch once in a while. [77]

Q. Can you tell the Court how much time you worked at the different jobs you were doing; can you segregate your time?

A. I put in about four days all told on the ditch during that time, and the rest of the time I was shoveling in the dump all the time into the boxes.

Q. You put in four days' labor on the ditch?

A. Yes, sir.

Q. That was the only extra work you did aside from shoveling in? A. Yes.

Q. Did you receive any part of the money coming to you? A. No, sir; not a cent.

Q. How much is now due?

A. One hundred and forty-five dollars and fifty cents.

Q. You have assigned your claim to the plaintiff, Algot Gustafson? A. Yes, sir.

Q. Did you see any notices posted on that claim, limiting the liability of the owners?

A. No, sir. That is the first thing I looked for when I came out there, if there was any notices

(Testimony of Knute Peterson.)

around, but I didn't see any.

Q. Where did you look?

A. I looked around the boiler-house where the notices are supposed to be, and around where we were working, but I didn't see anything around there.

Q. Did you ever have any talk with the owners, or— A. (Interrupting.) No.

Q. — or Ed Jern about notices being posted?

A. No, I never said nothing, and I never heard nothing about them.

Q. You say you looked for notices?

A. Yes, sir. [78]

Q. (Continuing.) —before you went to work?

A. Before I went to work. That is the first thing I look for.

Q. Do you know where the stakes are on the claim?

A. No, sir. I seen one stake, that is all, and I don't know whether it is a center stake or anything. I saw one stake. That is all I took notice of.

Q. And were you close enough to see if there was a notice on that stake?

A. There was nothing there.

Mr. ERWIN.—That is all.

Cross-examination.

(By Mr. FRAME.)

Q. Mr. Peterson, do you mean to say that you did four consecutive days, or four straight days' work on this ditch? A. Yes.

Q. Did you work a day at a time, go out and work a full day?

(Testimony of Knute Peterson.)

A. I worked sometimes pretty near half a day on the ditch; at other times an hour or two.

Q. Did you keep any track of it at the time?

A. I have been thinking over it, and it amounts to about four days.

Q. When did you begin to think about it?

A. Just after we filed the lien.

Q. It wasn't after you came to court this time, was it?

A. No. I pretty near know about how often I was there while I was working there. Sometimes the ditch broke out three or four times a day in different places. There was glaciers all along, all the way.

Q. And you would have to go down and work a short time, and sometimes you would work half a day, and sometimes a few hours?

A. I guess there was once I worked 4 or 5 hours. At other times I worked probably an hour or an hour and a half. [79]

Q. You estimate now that the length of time you put in was about four days? A. Yes.

Mr. FRAME.—That is all.

[Testimony of Carl Strass, for Plaintiff.]

CARL STRASS, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ERWIN.)

Q. Your name is Carl Strass? A. Yes, sir.

Q. You are one of the lien claimants in this action?

A. Yes, sir.

Q. You filed a notice of and claim of lien?

(Testimony of Carl Strass.)

A. Yes, sir.

Q. I will ask you if this (producing) is the original notice that you filed. A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

The COURT.—Who prepared those liens?

Mr. ERWIN.—I did.

Q. When did you (to witness) go to work upon Wolf Creek, on No. 2 Above?

A. On the 16th of May.

Q. When did you cease work?

A. I think it was on the 3d or 4th of June.

Q. On the 4th day of June, you say in your notice here. Now, how many days' work did you perform there? A. Nineteen days.

Q. At what rate were you working?

A. Six dollars.

Q. How much is now due you for that work?

A. A hundred and fourteen dollars.

Q. Have you received any part of that sum?

A. No, sir. [80]

Q. Have you assigned this claim to anyone?

A. No, sir.

Q. Haven't you assigned it to Gustafson, the plaintiff in this action, for the purpose of collecting it?

A. Yes.

Q. Now, Mr. Strass, what work were you doing on the claim?

A. Well, I was working in the dump part of the time and part of the time on the ditch.

Q. How much of the time were you working on the ditch? Can you segregate your time?

(Testimony of Carl Strass.)

A. I didn't keep track of the different places.

Q. Can you tell now approximately how much time you put in working on the ditch?

A. I think I put in about seven days on the ditch all told.

Q. Seven days on the ditch? A. About.

Q. You didn't keep track, you say?

A. No. I didn't keep track of the time I put in on the ditch or on the dump either.

Q. Was there any other work you did there besides shoveling in and working on the ditch?

A. Oh, yes. We had to shift the boxes occasionally. The center of the dump was worked out, and we had to shift the boxes to the sides a couple or three times while I was there.

Q. Did you do any work cribbing or anything of that kind? A. No, sir.

Q. Do you know whether or not any notices were posted by the owners of the claim limiting the liability of the owners for labor performed?

A. I never noticed any.

Q. Did you ever make any inquiry or search to see whether there were any notices? [81]

A. I inquired of the boys working there, Gustafson and some of the rest of the boys, if there were any notices, and they said no. And I didn't know there was any around in conspicuous places.

Q. Did you look for them?

A. I looked for them on the boiler-house and cook-house.

Mr. ERWIN.—That is all.

(Testimony of Carl Strass.)

Cross-examination.

(By Mr. FRAME.)

Q. Was the 1st of April the first work you did up there? A. The 16th of May.

Q. That was the first time you were on the claim to work there? A. Yes, sir.

Q. You say that of the nineteen days you worked on this claim, seven days of that was devoted to work on the ditch?

A. Approximately seven days, yes, sir.

Q. How many other men were working there besides yourself on the ditch? How many men were working for Jern? A. That worked on the ditch?

Q. No, that were working in the mine at that time between the 16th of May and the 3d of June?

A. Six of us.

Q. Six of you altogether? A. Yes, sir.

Q. How many men assisted you, or besides yourself, worked on the ditch during the time you were there?

A. There were two days there that the whole crew were up there, and at different times there would be just two or three up there and at other times a couple or one man. It was continually breaking out all the time, that is, cutting through the bottom.

Q. How long is that ditch?

A. I judge it would be about a quarter of a mile.
[82]

Q. How do you arrive at the time, that you spent seven days there?

A. Well, I was on that ditch pretty near half the

(Testimony of Carl Strass.)

time. I was on that ditch longer than I was shoveling in.

Q. You are sure of that? A. Yes, sir.

Q. How long were you shoveling in altogether?

A. All the time I spent in shoveling in, I don't think I put in over six days shoveling in.

Q. What did you do the rest of the time?

A. We had to thaw the dump, and shift the boxes around; different kind of work around the dump.

Q. You say you were to be paid \$6.00 a day?

A. Yes, sir.

Q. (Continuing.) For shoveling in?

A. For whatever work I done.

Q. You are sure you were not to receive \$5.00 a day?

A. I am certain sure of it, because I hired out at \$6.00 a day.

Q. You are sure you spent at least seven days on that ditch? A. At least seven days.

Mr. FRAME.—That is all.

Mr. ERWIN.—That is all.

Mr. ERWIN.—We have alleged in our complaint, or have asked for attorneys' fees at \$50.00 for each claim filed. I presume the attorney for the defendant will stipulate that we need not introduce any testimony in regard to that, but leave it to the Court to fix the attorneys' fees if he thinks that we are entitled.

The COURT.—If I need any assistance, I will allow you to call attorneys.

Mr. FRAME.—We will so stipulate. [83]

Mr. ERWIN.—I would like to recall Mr. Honk.

[**Testimony of Gust Honk, for Plaintiff (Recalled).**]

GUST HONK, witness for plaintiff, recalled, testified.

Direct Examination.

(By Mr. ERWIN.)

Q. There has been considerable testimony about work on a ditch. You were foreman there?

A. Yes, sir.

Q. Tell the Court about that ditch, and why it was necessary to do so much work there.

A. Yes. The creek was nothing but glacier mud and glacier sand. And in the spring when it began to thaw out, especially when there was a lot of water like that, it would wash out right along. And we had to get two or three wheelbarrows and wheel steadily from old tailing piles that were on Number 3 for over two days steady into the bottom of the ditch just in one stretch. Then most of the time my own work was on the ditch pretty near most of the time because she was breaking out constantly all along the ditch.

Q. Did you testify to how many days you worked on the ditch?

A. I think it was somewheres around about five or six days what I consider, including all.

Q. That ditch was continually in need of repair?

A. It certainly was. And Mr. Noble knowed that himself. He was up there himself when we were up there fixing it.

(Testimony of Gust Honk.)

Q. (By the COURT.) Who?

A. Mr. Noble, the defendant in this case.

Q. (By Mr. ERWIN.) Did he work on the ditch himself?

A. He was along there, yes, and also Mr. Ed Jern too.

Q. You say you put in five days and a half on that ditch, repairing it?

A. Yes, sir, that is what I consider a fair estimation of the time I put in. [84]

Q. Did I understand you to say that you were fixing a gin pole during the time you claim a lien here, during those days? A. No. It was before.

Q. Did you ever see any notices posted on that claim? A. Not at any time.

Q. Did you ever discuss the fact with the owners or with Ed Jern as to whether there were notices posted? A. No. I never did.

Q. Did you ever discuss it with any of the laborers there?

A. Yes, I did. The boys down in the mine all came to me and at one time asked me if there was a—whether they could be sure of their money, and—

Mr. FRAME.—We object as irrelevant, incompetent and immaterial, and not binding on the defendants. (Objection sustained.)

Mr. ERWIN.—That is all.

Cross-examination.

(By Mr. FRAME.)

Q. You have worked on that ground longer than any of these men? A. Yes, sir.

(Testimony of Gust Honk.)

Q. You are well acquainted with that ground out there? A. I ought to be.

Q. You have worked there for over a year, haven't you? A. Yes, sir.

Q. You know this is an old claim that has been in the course of operation by Mr. Jern, by Mr. Shon, by Mr. Anderson, and other laymen for a period of two or three years? A. I didn't hear what you said.

Mr. ERWIN.—We object to that as irrelevant. (Overruled.)

The COURT.—He asked you if you didn't know the claim had been worked by different men for the last two or three years. How long have you known the claim to be worked? [85]

A. Charley Erickson started in in the fall of 1910. It was the first hole that was put down on the ground. And Mr. Anderson—I guess he started in about—I must be mistaken. It was in the fall of 1909, I think. Then Mr. John Anderson—I guess he started in in—

Q. State what you know and saw there yourself; not what somebody else told you.

A. I wanted to show the Court what time it was. I believe it was in the fall of 1909 when Charley Erickson started in to work. Yes, it was.

Q. (By Mr. FRAME.) You knew these men had been out there taking the pay out of that ground for the last two years? A. Yes, to a certain extent.

Q. Taking the pay out of the ground?

A. Yes, to a certain extent.

Q. Now, you testified a few minutes ago that you had spent at least five days and a half working on

(Testimony of Gust Honk.)

that ditch? A. Yes, I did.

Q. You mean during the time you claim this lien for? A. During the time.

Q. You say that during the time you claim this lien you spent five days and a half working on that ditch?

A. Yes, sir. I did.

Q. You were also, during that time, working sluicing? A. Exactly.

Q. You gave a portion of your time superintending the work of sluicing and cleaning up, and superintending the work, all the mining operations going on there?

A. Yes, on the Ed Jern lay I was supposed to represent his part of it.

Q. And in this lien you say that you worked eight and a half days continuously?

A. Eight days and nine hours I think. [86]

Q. Now, I will ask you if you didn't testify this morning that you worked about six days of that time in making cribbing?

A. No. I don't think I did. Not in that time. I meant from the first part of May and not from the 16th part of May.

Q. You are absolutely sure of that?

A. Yes. I don't think I did. I am not quite certain.

Q. Your best recollection is now that this morning you didn't testify that you spent about six days in cribbing?

A. Making cribbing it was, cutting them out. I was doing most of that work myself.

(Testimony of Gust Honk.)

Q. When did you say you did that work?

A. In the month of May.

Q. It was not after the 16th of May?

A. No, I never said that exactly; part of it might have been, and part not.

Q. Didn't you say this morning that all of that work was done after the 16th of May?

A. No, I don't think I did.

Q. Didn't you say that all of your time was put in in making that cribbing and superintending the sluicing of the dump and the cleanup that was going on? A. In May, but not after the 16th.

Q. After the 16th of May, during the time you claim a lien for?

A. No. I must have misunderstood it.

Q. There is no misunderstanding now?

A. About what?

Q. About what you have been testifying to.

A. Not concerning that now.

Q. There is no misunderstanding now about what you have been testifying to?

A. No, not that I know of. I know for sure I put in between five and six days on the ditch, and I put in some time on the cleanup from the 16th of May up to the time I quit. [87]

Q. You are sure that you put in five and a half days after the 16th day of May upon this ditch?

A. Yes, and I can show the reason why.

Q. How much time after the 16th of May did you spend in making cribbing?

A. That is a time I couldn't say exactly. But on

(Testimony of Gust Honk.)

the ditch, I can be sure of.

Q. Why can you be sure?

A. When the frost begins to get out of the ground it is much easier for the water to cut down.

Q. Why can you be so sure that you can say to the Court that you spent at least five and a half days on that ditch after the 16th of May?

A. Yes, I am certain of that.

Q. Explain to the Court your reason, how you arrive at that.

A. The latter part of May was the time that the ditch started in to bother us. It was bothering us occasionally before. Mr. Anderson and Shon and Erickson, when they were sluicing and using the water, we had very little trouble with the ditch. But after they got through, then was when the trouble started in. It seems we got the benefit of all the trouble. That is the reason, it seems, why we put in so much time, because I had to be on the ditch almost at all times, I might say.

Q. Because the ditch began to give trouble in the latter part of May, you are absolutely sure you spent at least five and a half days' work on it?

A. I am. Yes.

Q. That is your only reason? A. Yes.

Q. That is the only reason that enables you to fix the time at five days?

A. At least that, I am certain of it.

Mr. FRAME.—That is all. [88]

(Testimony of Gust Honk.)

Redirect Examination.

(By Mr. ERWIN.)

Q. Mr. Frame asked you in regard to work having been done on that claim for a long time previous by other laymen. Isn't it a fact that you opened up new ground? A. Yes, sir.

Q. Isn't that considered by miners dead work, and isn't it an improvement of a mine any time you go in on a new block of ground and open it up?

A. Benefits, I name it, and more of them call it that.

Q. You call it that? A. Yes.

Q. And you have been mining how long?

A. Nine years in Alaska.

Q. You consider that development work and improvement work on a mine, do you not?

A. Yes, I do.

Q. In other words, in a placer mine when you have to open up a new block of ground, that would constitute work of improvement and development until such time as you got it opened up?

A. Why, certainly.

Q. (By the COURT.) What was the occasion of you getting the check that was introduced in evidence amounting to \$1,313? A. How is that?

Q. How did you come to get the check on the 1st of May?

A. I don't think it was on the 1st of May.

Q. When was it given to you?

A. Around the 12th or 14th, I don't remember which.

(Testimony of Gust Honk.)

Q. Why did you get the check at that particular time; how was it given to you, and why?

A. Ed Jern gave it to me.

Q. Did you have a settlement?

A. He settled up for some of the work I had been doing. [89]

Q. And you kept on just the same after that?

A. Yes.

Q. (By Mr. FRAME.) He doesn't owe you anything except this \$68.50 that you claim here?

A. No.

Q. That check he gave you was in settlement for everything that you had done on that ground?

A. How is that?

Q. That check was in settlement for everything you had done on that ground?

A. In fact, we never figured out the time very close: In fact he never mentioned about that, that it was pay in full.

Q. Don't you know that it was?

The COURT.—I think you went into that.

Mr. FRAME.—Yes.

Q. You didn't sink any shaft or run any tunnels in May on this ground? A. No. We did not.

Mr. ERWIN.—I would like to offer in evidence the notices and claims of lien of these different claimants.

Mr. FRAME.—I wish to object to each one upon the grounds: First, that it is incompetent; for the second reason, that the items of the work for which the lien is claimed is not a lien under our statute,

that it is not for work and labor and services performed that are shown by the testimony to be done on this property.

The COURT.—They may be admitted under the objection—

Mr. FRAME.—And for the further reason that they do not conform to the statute.

The COURT.—That objection may also appear. Of course, I have no idea in what particular your objection goes, under the statute, but I will allow you to make it. It is an objection I would not pass on ordinarily. I want a man to point out in his objection the particular point, so the appellate court and this [90] Court may know what the real reason is. I am saying this for the future, because I have passed on this. But I will allow you an exception.

Mr. FRAME.—In that the lien does not state the amount of the offset, or after making offset that there is any balance due. That goes to one of them, and I make the same objection to all of them.

Mr. ERWIN.—I think I had better offer them separately, so as to get a record of them.

The COURT.—I have already admitted them. They may be marked, and the objection and exception goes to each and every one of them.

(Marked Plaintiff's Exhibits "G," "H," "I," "J," "K" and "L.")

Mr. ERWIN.—Plaintiff rests.

Mr. FRAME.—We move to dismiss this cause, and for judgment of dismissal in favor of the defendants for the reason: First, that the evidence which has been introduced by the plaintiff does not sustain any

of the allegations of their complaint; and for the further reason, that the testimony introduced by them shows that the work and labor which they have done and performed on this ground has been done in the operation of the ground as a placer mine, and that none of it is work or services performed for which our statute gives a lien.

The COURT.—Part of the question I will not pass on ultimately at present. I will overrule your motion to dismiss because I believe that under the evidence it shows contracts with most of the men for a much longer period than under the allegations set up. I think, under the circumstances, I ought not to preclude these workmen from recovering on what are the facts. These liens might well have stated that these contracts in most cases began at a certain time, certainly much earlier than the time [91] they began this new shaft and put in their cross-cuts, and continued down until the end. That has not been done, and in one or two instances could not have been done because the men were not hired until later; but, rather than segregate them, I will just overrule your motion as a whole, and pass on that particular part of it later on.

Mr. ERWIN.—I wish to recall Mr. Knute Peterson.

**[Testimony of Knute Peterson, for Plaintiff
(Recalled).]**

KNUTE PETERSON, recalled, a witness for plaintiff, testified:

Direct Examination.

By Mr. ERWIN.—There is an objection made to a

(Testimony of Knute Peterson.)

certain blank that is not filled out here, and I overlooked asking Mr. Peterson about it. In executing the lien before Commissioner Weis, they left two blanks. It says: (reads) "At the agreed price of \$5.00 per day, amounting to the sum of \$145.00, no part of said sum has been paid except \$——— on account thereof, and there now remains due claimant for said work and labor the sum of \$———." I asked him on direct examination if this amount was due, and I have called him for the purpose of explaining, if he can, why it was not filled in in the second blank.

The COURT.—If you covered it in your testimony, there is no need of taking up time.

[Testimony of Carl G. Erickson, for Defendants.]

CARL G. ERICKSON, a witness for defendants, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. FRAME.) Q. State your name.

A. Carl G. Erickson.

Q. You live in the Fairbanks Recording District, do you? A. Yes.

Q. What is your occupation? A. Mining. [92]

Q. Are you acquainted with that placer mining claim known as Number 2 Above Discovery on Wolf Creek, a creek claim? A. Yes.

Q. I will ask you if you were in possession of that property as lessee. A. Yes, sir.

Q. When did you obtain a lease, and from whom?

Mr. ERWIN.—We object to that as having noth-

(Testimony of Carl G. Erickson.)

ing to do with this case. It was a lease being worked by Ed Jern that these laborers claim under. They do not claim for work done for Carl Erickson.

The COURT.—I will see.

Q. (By Mr. FRAME.) This is the lease (handing to witness) executed by Jesse Noble to Erickson?

A. Yes.

Mr. FRAME.—On the 23d of March. We introduce that in evidence.

The COURT.—I suppose you are going to connect it, the sale of it to Ed Jern?

Mr. FRAME.—Yes. Q. How long did you remain in possession of the ground under that lease?

A. From March in 1909 to in September—to the 2d of September, 1910.

Q. What did you do on the 2d of September, 1910?

A. I sold the lease.

Q. To whom? A. To Ed Jern.

Q. I will ask if this (handing to witness) is the bill of sale? A. Yes, sir.

Mr. FRAME.—I now offer in evidence the bill of sale from Erickson to Ed Jern, and ask that it be admitted in evidence.

The COURT.—It may be admitted and appropriately marked.

(Lease marked Exhibit 2 and assignment thereof as Exhibit 3.) [93]

Q. (By Mr. FRAME.) I will ask you if you are acquainted with Gus Honk. A. Yes, sir.

Q. The gentleman who gave testimony here this morning? A. Yes.

(Testimony of Carl G. Erickson.)

Q. Was he working for you during the time you were operating this ground? A. Yes, sir.

Q. State to the Court what you did, if anything, in respect to posting notices upon that ground.

A. I got the two notices from Mr. Noble about the 4th of June, 1910, to post up on the ground in some prominent place or stationary place where it couldn't be moved like on the center post, and I did post one on the center upper initial post.

Q. I will ask you if you know what these notices contained? A. Yes.

Q. What did they contain?

A. They contained that the claim owners would not consider themselves responsible for any debt contracted or was contracted from this lease on said ground.

Q. By whom was that notice signed?

A. By Jesse Noble, Luther Hess and Ben Boone, By Noble.

Q. By Noble. Was it signed "Luther C. Hess"?

A. "Luther C. Hess."

Q. Ben Boone? A. Yes.

Q. By Jesse Noble?

A. "And Jesse Noble. By Jesse Noble."

Q. Where did you post this notice?

A. On the upper initial post on the upper end of the claim, adjoining Number 3 creek claim.

Q. I will ask you to state whether this was a conspicuous place or in a position where it could be easily seen. [94]

A. A man working on that claim, walking up and

(Testimony of Carl G. Erickson.)

down that ditch could see that notice on the center post, the initial post. The ditch belonged to the claim, and any man working there would be walking up and down there sometime.

Q. How far from the ditch was that stake?

A. It could not be but 15 or 20 feet from the ditch.

Q. What portion of the claim were you working on? A. On the middle part.

Q. Could you see this upper center stake from where you were working? A. No.

Q. Why not?

A. There were obstacles in the road, boiler-houses and some green trees.

Q. Was there a boiler-house on the ground when you posted the notice?

A. Yes, there were three boiler-houses on the ground.

Q. Were they all on Number 2 Above Discovery, creek claim? A. Yes.

Q. You say that Gust Honk was working for you at this time. A. Yes.

Q. Did you ever talk with him in regard to these notices? A. No.

Q. You had no conversation with him in regard to them.

A. No, to nobody. I mentioned it to Ed Jern that I posted it there.

Q. How far from the boiler-house was this notice?

A. It would be about seven or eight hundred feet, between seven and eight hundred feet.

Q. During the summer of 1910 you constructed a

(Testimony of Carl G. Erickson.)

ditch out there, didn't you, or did you?

A. What is that? [95]

Q. Didn't you, while you were in possession of that ground, construct a ditch? A. Yes.

Q. Where did it lead from?

A. From Number 3, Wolf Creek. Started in about two or three hundred feet up Number 3, Wolf Creek, and run down onto 2 where I was working.

Q. Have you been on the ground recently?

A. Yes.

Q. When were you there last?

A. Sometime about three weeks ago. I couldn't remember the date exactly.

Q. Was this ditch you constructed still on the ground, still in use? A. Yes, sir.

Mr. FRAME.—That is all.

Cross-examination.

(By Mr. ERWIN.)

Q. What day did you say you received those notices?

A. I couldn't say the date. It was the latter part of June or the 1st of July.

Q. Of what year? A. 1910.

Q. Who was the owner of the claim at that time, if you know?

A. Mr. Noble, Luther C. Hess and Ben Boone.

Q. Do you say that all three of those names were signed to that notice? A. Yes, sir.

Q. Who signed the names?

A. I couldn't say that. I don't know their signatures.

(Testimony of Carl G. Erickson.)

Q. What was it; a typewritten notice?

A. Yes, sir.

Q. Who gave you the notice to post?

A. Mr. Noble. [96]

Q. How soon after you got the notice did you post it?

A. A few days afterward. I don't recollect how many days, but a short time.

Q. That was about the 1st of June, 1910.

A. Sometime in June or July, 1910.

Q. In July? A. Yes.

Q. You were working the ground then on a lay?

A. Yes.

Q. Whereabouts were you working?

A. Middle part of the claim.

Q. Did you have a boiler-house there?

A. Yes, sir.

Q. Why didn't you post that notice at the boiler-house?

A. It might be torn down at any time—the boiler-house, because we were going to move that anyway.

Q. You posted that notice to give the laborers notice, didn't you, and wanted them to see it?

A. Yes, and they could see it if they wanted to at that time. In walking up and down the ditch they couldn't help but see it.

Q. You posted that on a post at the lower end of the claim? A. At the upper end of the claim.

Q. Just one notice at the upper end?

A. Yes, sir, on the initial post on the upper end.

Q. What kind of a post was that?

(Testimony of Carl G. Erickson.)

A. A spruce post about four feet high I should judge.

Q. (By the COURT.) Was it the initial post of 2 or 3?

A. I couldn't say. This is the initial post of the ground.

Q. Of which ground?

A. On Number 2 creek claim, Wolf.

Q. You say now it was the initial post of Number 2 Wolf? A. Yes.

Q. I asked you that first.

A. I didn't understand you. It was adjoining 3. The line adjoins it. [97]

Q. But it might be the initial post of 2 or the initial post of 3.

A. It was the initial post of 2.

Q. (By Mr. ERWIN.) Do you know what is meant by the initial post of the claim?

A. Where the locator has his name.

Q. Do you know how that claim was staked? Did they begin staking at the lower end or upper end?

A. I don't know. The writing was blunted now, but I could see it was the initial post, and the writing reads for number 2.

Q. Was there brush or anything around that post so it couldn't be seen?

A. It couldn't be seen from the middle or lower end of the ground?

Q. How close would you have to go to that post to see it?

A. In places within 200 feet of the post you could

(Testimony of Carl J. Erickson.)

see it walking up and down the ditch, you could see the post standing on the lower side of the ditch from 15 to 20 feet from the ditch.

Q. Which side of the post did you pass on the ditch? A. Facing the creek claim, downstream.

Q. You say a person could easily see that, walking up and down the ditch? A. Yes.

Q. How large a piece of paper was that?

A. I couldn't say that for sure, but it must have been about ten inches long or twelve inches long and eight or ten inches wide. I couldn't say for sure how big it was, but something about that size.

Q. How long did that notice remain there?

A. It remained there to— I was up the ditch in August before I sold out and I saw the notice was stuck on the post then? [98]

Q. In August, 1910? A. Yes.

Q. It was there when you sold out?

A. So far as I know. I wasn't up there the day I sold out, but two or three days before. And it must have been there, if nobody tore it down.

Q. Where did you post the other notice that he gave you? A. I didn't post that.

Q. Have you that notice yet? A. No.

Q. You say he gave you two notices?

A. Yes.

Q. What became of it?

A. It was laying up there in the cabin when I left.

Q. Did you ever make a point of hunting for it to see if you could find it?

(Testimony of Carl G. Erickson.)

A. I never was back there to hunt for anything afterward.

Q. Do you think you would be able to find that copy if you would search for it?

A. Some parties lived in that house after I left there, and it possibly would be there now. It may be there now for all I know.

Q. You say that at the time you posted this notice there were three boiler-houses on that ground?

A. Yes.

Q. Were there three sets of laborers working there, three sets of laymen? A. Yes.

Q. Did you ever tell the laborers that there was such a notice posted?

A. No, I didn't think I needed to.

Q. You didn't mention it to anyone?

A. No. The bills could be paid. [99]

Q. (By the COURT.) What do you mean?

A. I didn't need to notify them about posting notices because their labor was good—their wages was good whenever it was due.

Q. (By Mr. ERWIN.) Wasn't there a more conspicuous place on that claim. to post that notice than on this stake on the upper end?

A. The initial post isn't supposed to be moved at any time on a claim.

Q. I say, if you were posting up a notice for the public to see, and especially laborers coming on the claim, wasn't there a better place to post that so they would see the notice?

A. They wouldn't exactly need to see it at that

(Testimony of Carl G. Erickson.)

time, but they could see it if they wanted to see it in going up and down the ditch. On the boiler-house—they might tear the boiler-house down in a month or a week and have to move it again.

Q. You were afraid you would have to move it if you put it on the boiler-house?

A. I wasn't thinking of that at that time.

Q. How far were you working from this post?

A. I was half ways down the claim. About seven hundred feet I judge.

Q. About seven hundred feet?

A. Just about that, more or less.

Q. And that was about as close as any of these laborers would get to that post, unless they went around the claim to look for a notice.

A. They had to go up and down the ditch sometimes, looking for to get down the water through the ditch.

Q. What would be the fact in regard to that notice in the winter. Would that post be covered with snow at that time?

A. I couldn't tell you that a notice is liable to be covered with snow. [100]

Q. The fact that some of these laborers came on there long after you sold out in the winter, would they be able to see that notice then?

A. I don't know about that. I was outside, not in the country when they were working there.

Q. You were not out there in the winter?

A. No. I wasn't in Alaska at all then.

Q. Was there any trail running by this post that

(Testimony of Carl G. Erickson.)

was in common use up and down the creek?

A. No. The trail went further up the hill.

Q. How far up the hill was the trail?

A. I judge about two hundred and fifty feet, somewhere around there, up the hill from the initial post.

Q. Was that the trail that people used commonly in going up and down the creek? A. Yes, sir.

Q. They didn't use the ditch?

A. Not very much, except the trail was muddy they might go up and down the ditch.

Q. There was no occasion to go up and down that ditch in winter when you were not using it?

A. I don't know. I couldn't tell you.

Q. The only time you would go up and down that ditch would be when the water was running and you would be sluicing? A. Yes, sir.

Q. You say you constructed that ditch?

A. Yes.

Q. Or helped construct it?

A. Yes, I helped construct it.

Q. Do you know whether or not that ditch was in constant need of repair during the sluicing season while water was used?

A. A ditch always needs repairs all the time. All the time it is cutting out. [101]

Q. Do you know at what time Luther C. Hess became interested in that claim as an owner?

A. I couldn't say.

Mr. FRAME.—We object as immaterial and incompetent.

Q. (By Mr. ERWIN.) Do you know when Ben

(Testimony of Carl G. Erickson.)

Boone became an owner? A. No.

Q. But you say their three names were on the notice. A. Yes.

Q. And that that notice was given you in July, 1910.

A. Given to me in the latter part of June or the first part of July.

Q. That is the only notice that you ever posted?

A. Yes.

Mr. ERWIN.—That is all.

Redirect Examination.

(By Mr. FRAME.)

Q. In going from the claim, was it customary for the workmen to pass up and down this ditch?

A. In the summer when the water was running especially they have to go up and down that ditch repairing the ditch all the time.

Mr. FRAME.—That is all.

Recross-examination.

(By Mr. ERWIN.)

Q. Where was the messhouse with reference to this post that you claim you posted a notice on?

A. They had the messhouse on the lower end of the ground. They were not boarding the men; they were boarding themselves.

Q. Did they have a bunkhouse or a messhouse anywhere near this post? A. Not at that time.

Q. The nearest building, as you have testified, was some seven or eight hundred feet, the boiler-house.

A. Yes, to where we worked. [102]

(Testimony of Carl G. Erickson.)

Q. Have you ever had occasion to post notices on ground of your own? A. No, sir.

Q. Did Mr. Noble, at the time he gave you that notice, tell you where to post it?

A. Yes. I think he did.

Q. Where did he tell you to post it?

A. On the initial upper center post, the initial post; on the upper center post and on the lower one, too, but I never did post it on the lower one. That is the reason why he gave me two.

Mr. ERWIN.—That is all.

[Testimony of Luther C. Hess, for Defendants.]

LUTHER C. HESS, a witness for defendants, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. FRAME.)

Q. What is your name?

A. Luther C. Hess.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. You are acquainted with placer mining claim Number 2 Above Discovery on Wolf Creek?

A. Yes, sir.

Q. You are an owner in that ground?

A. A part owner.

Q. I will ask you if you were on this ground in the fall of 1910.

A. I have been out there a number of times. I don't know, but I think I was there in the fall of 1910.

(Testimony of Luther C. Hess.)

Q. Were you there in the summer of 1910?

A. Yes. I was there sometime during the summer of 1910. I couldn't tell the date, and probably not the month. [103]

Q. You couldn't tell the month? A. No.

Q. What did you do when you went out there?

A. I had an interest in the property, and I went up to see what was being done.

Q. Did you make an examination of the property in respect to ascertaining whether or not any notices were posted?

A. There was one time I went up there that I did.

Q. Can you tell about what time it was?

A. I should say it was probably in the fall of 1910.

Q. Was— Who was in possession of the ground at that time?

A. I think Mr. Jern was. I was there several times while Mr. Erickson was there, and then after he disposed of his lease I was there when Mr. Jern was there.

Q. What did you find, if anything, in regard to notices?

A. I found the notice posted on the lower center post, and I may have seen one on the upper, but I don't remember distinctly about that.

Q. What did this notice contain that was posted on the lower center post?

A. It was, as I remember it, a written notice prepared by Mr. Noble, setting out that the owners would not be liable for work or labor performed on the claim. I don't remember the wording of it.

(Testimony of Luther C. Hess.)

Q. You say Mr. Jern was in possession of the ground at this time?

A. I think he was there. I wouldn't be positive, but I think he was there. I think it was in the fall after Mr. Erickson had sold out.

Q. Were these notices posted pursuant to instructions from you?

A. I had a talk with Mr. Noble about it, and told him— After I got interested in the property, I told him that the notices ought to be posted—that would be the only instructions I [104] suppose—and he said he would look after it.

Q. When were you on the ground after that?

A. I was not on the ground until the spring of 1911, after that. I went outside that winter, and I wasn't out there until the spring.

Q. Did you ever see notices posted on the ground after that? A. I am not certain that I did.

Q. Do you remember now how this notice was signed?

A. Well, I believe, if I remember, that my own name and Mr. Boon's was signed by Mr. Noble. I think it was prepared by Mr. Noble. I know it is not a notice that I prepared myself. It was posted on the lower center post of the claim.

Q. I believe you stated the last time you were on the claim was in the spring of 1911.

A. Yes.

Q. What time?

A. I was up there one time after coming in, but I don't think I stopped any length of time then. And

(Testimony of Luther C. Hess.)

then I think the next time I was out there was in the latter part of May.

Q. What did you see there at that time?

A. In May?

Q. Yes.

A. They were sluicing the dump. I think I came there on the 3d or 4th of May, and they had probably about a third of the dump sluiced at that time. They were sluicing, and I didn't expect to attend the cleanup, but they told me they wanted to clean up the next day, and I remained over and attended the cleanup at that time.

Q. When were you there again, next?

A. I was there one other time, I think in May, and then in June, the latter part of June, about the time Mr. Jern quit his operations. [105]

Q. What work was being done there on the ground? A. During May?

Q. Yes.

A. They were sluicing the dump that had been taken out during the winter.

Mr. FRAME.—That is all.

Cross-examination.

(By Mr. ERWIN.)

Q. Do you remember the date that you became interested in that ground?

A. No, I do not, but I think in 1910, sometime, but I don't remember when it was.

Q. The bill of sale is on file?

A. I think so, yes. If it is not, I have it in my possession; but I think it is recorded.

(Testimony of Luther C. Hess.)

Q. Do you know who posted that notice on the lower stake?

A. I do not. I do not know who posted it, except I know there was a notice there.

Q. What kind of a notice was that, a typewritten notice? A. No. It was a written notice.

Q. And you say you think your name and Ben Boone's were signed to it as owners?

A. I think my name and Ben Boone's were signed to it as owners, yes.

Q. And Jesse Noble as agent?

A. I think that is the way it was prepared.

Q. What kind of a post was that?

A. It is a spruce post, I suppose about—it must be about five feet high, five or six, a rather tall post.

Q. Where was it planted with reference to the creek?

A. I think it is on the left limit of the creek.

Q. How far from the creek?

A. Not very far from the creek. It is down in the bottom, and I think on the right limit, but I wouldn't be positive of that. [106]

Q. What is the character of the timber growth around that post?

A. There is very little timber there of any kind. There was lots of timber there in the early days, but it has all been cut down. The only growth there is some short willows.

Q. Do they grow up as high as the post or higher?

A. They were not at that time. The post could be seen very well.

(Testimony of Luther C. Hess.)

Q. During the summer they would attain a height that you would have to go right up to the post to find it?

A. No, I don't think you would. I think you could see that post a considerable distance up the claim. If you were on 1, 1 creek claim is covered with a good deal heavier growth than Number 2, because it hadn't been worked at all.

Q. What time was it that you saw the notice on the post? A. I think in the fall of 1910.

Q. How late in the fall? A. I couldn't tell.

Q. Was it after snow came?

A. No, it was before the snow came, because I think there was no snow when I left. I think I left here about the 1st of October. It might have been in September when I saw it.

Q. Was that the initial post of Number 2 Wolf Creek?

A. It is the post that was used for both the claims. I think there is only one post there, as I remember, between the upper end of 1 and the lower end of 2. It was used for the initial post of one claim, and the upper end post of the other. I don't know just how those claims are staked. Ordinarily it would be the initial post of Number 2.

Q. How large a face would that post have?

A. I suppose it was probably four or five inches, four inches in diameter, square about four inches.

Q. A spruce tree cut off?

A. I think it was a spruce tree cut off. [107]

(Testimony of Luther C. Hess.)

Q. Old and weather-beaten or new so it could be seen easily?

A. I don't remember, but I think it was an old post.

Q. Could you read the notice that was posted there? A. Yes.

Q. Did it have the appearance of having been freshly posted, or of having been there for some time?

A. No, I don't think it had been posted very long. It looked quite fresh at that time.

Q. On which side of the post was the notice on?

A. As I remember, it was somewhat around the post. I am not perfectly clear as to that.

Q. How near to that post did you have to come before you would see that notice?

A. You could see the notice—the white paper—for some distance, but you would have to go up to it to read it.

Q. How far could you see the post?

A. Well, you could see the post from the trail that went along the sidehill from different points that would be, probably, I should say, two hundred feet.

Q. Two hundred feet to the trail? A. Yes.

Q. That is where the travel went?

A. Yes, the general travel.

Q. To the claim?

A. Up and down the creek, not only to that claim.

Q. From what distance from that post was the boiler-house?

A. There was not much of a boiler-house on the

(Testimony of Luther C. Hess.)

claim, except on the upper end where Mr. Foster had put up a boiler-house. There were some small shack houses, mere temporary affairs.

Q. How far away would it be from the messhouse and bunkhouse?

A. I don't believe— There was a little cabin on the claim that you might call a bunkhouse, where the boys were living, and I think that messhouse was put up a little later. The messhouse [108] was put up on the side claim; it was not on Number 2.

Q. How far from this post was the work being carried on on the Jern lay?

A. Jern had the entire claim, as far as that was concerned, but he had sublet lays. There were some boys working at the lower end, and they were quite close to that post; then Foster at that time had taken a lay on the upper three or four hundred feet—I have forgotten just how much. He would have been quite a distance from it, probably eight or nine hundred feet up to where he was. Then where Jern himself was operating was between those two.

Q. Where Jern was operating would be about the center of the claim.

A. Somewhere near the center of the claim.

Q. And some six or seven hundred feet from the lower end of the claim, from the lower end post?

A. Yes, sir; five or six hundred. I think the lower lease was two hundred and fifty feet; then he began about that, but I don't know just how far his shaft was up from the other work.

Q. When was the last time that you and Jesse

(Testimony of Luther C. Hess.)

Noble had a conversation with regard to putting a notice there? A. I cannot tell you that.

Q. You say you mentioned to him later than that that there ought to be notices.

A. I mentioned to him after I acquired an interest in that that there ought to be notices posted and kept posted, and he said he would attend to them.

Q. And the only time that you did see the notice was the time you mentioned, in the fall?

A. The only time I am certain that I saw it was the time I stated.

A. You didn't testify that you saw the notice in May or June, 1911? [109]

A. I didn't have the time. I might have seen the notice, but I have no recollection of it, because my attention was not called to it at all, and I wasn't looking for it.

Q. You could have seen the post at the time, could you, from where you went along the trail?

A. If I had looked, I think so. I don't remember anything about it.

Q. You own quite a few interests in claims here?

A. Yes, sir.

Q. You post notices of that kind right along on your claims, do you? A. Very seldom.

Q. You have posted those notices—

A. I think maybe I have posted a few. I am not certain whether I have, other than in this instance.

Q. When you posted notices, it was for the purpose of giving the laborers notice? A. Yes, sir.

Q. Where do you post your notices or instruct your

(Testimony of Luther C. Hess.)

agents to post them when you have them posted on your ground?

Mr. FRAME.—We object as immaterial.

The COURT.—Overruled. (Mr. Frame excepts; exception allowed.)

A. Where do I post them?

Q. (By Mr. ERWIN.) Yes.

A. I post them on the claim so they can be seen.

Q. You try to pick out a conspicuous place on the claim where they can be seen? A. Yes.

The COURT.—There may be some custom about posting these notices. I would like to be informed as to what method is adopted by claim owners here in regard to posting notices.

Q. (By Mr. ERWIN.) Where is your custom to have your notices posted? [110]

A. I couldn't say that I have a custom. I don't remember of having posted a notice of nonliability, except to instruct somebody to do it. But, if there was no other prominent object on the claim, I should instruct a man to post it at the initial post; if there was some other that was more conspicuous, probably I would have it posted there.

Q. Provided there is a boiler-house, or messhouse, or bunkhouse on the claim, would you have it posted there?

A. If there was a permanent building, I think I should. I would have one notice there, and I might have others posted at other places on the claim.

Q. They have a hoisting apparatus over the shaft.

(Testimony of Luther C. Hess.)

Wouldn't that be a good place to post it so it could be seen?

A. It might be a good place to post it, but it would be a poor place to post it and have it maintained because it would probably be torn down in a short time where the men are around it every day.

Q. But the agent or owner could then see that it was down and post another one very easily.

A. He could.

Q. You say you were out to the claim about the 3d or 4th of May? A. Yes, sir.

Q. They were then sluicing?

A. They were sluicing the dump. I should think they had about one-third of the dump sluiced at that first cleanup. How long they had been sluicing before that, I don't know, except from the general appearance of things.

Q. Were they having trouble with the ditch when you were out there? A. I think not.

Q. You don't know anything about that?

A. No. [111]

Mr. ERWIN.—That is all.

Redirect Examination.

(By Mr. FRAME.)

Q. Do you know how long this claim had been operated as a placer claim?

A. The lease was given before I became interested in the property, and I have been informed it was given in 1909, and some work I know was done in that year.

Q. The defendant Ed Jern operated this claim as

(Testimony of Luther C. Hess.)

a placer mine during the time— A. Yes.

Q. Spring of 1910 and 11? A. Yes.

Q. He took out a dump? A. Yes.

Mr. FRAME.—That is all.

Recross-examination.

(By Mr. ERWIN.)

Q. He was working on virgin ground during the latter part of the year 1911, that is, during March and April? A. Working out virgin ground?

Q. Yes. Sinking a shaft and tunnelling and opening up a new block of ground?

A. I know nothing of that except hearsay.

Q. Were you ever underground in the workings?

A. No. I don't think I was down in the shaft at that time. I think I was down in the shaft below, in the lower portion.

Q. Were you ever down in those workings on the new block of ground? A. No, I think not.

Mr. ERWIN.—That is all.

Mr. FRAME.—That is all. [112]

[Testimony of Jesse Noble, for Defendant.]

JESSE NOBLE, a witness for defendant, after being sworn, testified as follows to wit:

Direct Examination.

(By Mr. FRAME.)

Your name? A. Jesse Noble.

Q. You are one of the defendants in this action?

A. Yes, sir.

Q. I will ask you if you are acquainted with that claim known as placer mining claim Number 2 Above

(Testimony of Jesse Noble.)

Discovery on Wolf Creek? A. Yes, sir, I am.

Q. When did you first become acquainted with that ground? A. In the fall of 1903.

Q. Were you one of the original locators of it?

A. I located the claim myself, that is, I located it by power of attorney at that time. In 1902 I should say instead of 1903.

Q. I will ask you if you are acquainted with the plaintiff in this case, Algot Gustafson?

A. I have met him on the ground out there and seen him several different times. I am fairly well acquainted with him.

Q. I will ask you if you were on this claim during the fall of 1910 and the winter of 1911?

A. Yes, sir, I was.

Q. Did you at that time see any notices upon the ground? A. Yes, sir.

Q. Where were they? Do you know what they contained?

A. Yes. I writ the notices that were there at that time myself.

Q. What did they contain?

A. The upper notice gives notice on paper and says: "The undersigned will not be responsible for any debts contracted by the laymen or for materials furnished to the laymen."

Q. (By the COURT.) When was this?

A. In 1910. [113]

Q. (By Mr. FRAME.) What period of 1910?

A. The first notice was put up by Mr. Erickson on the upper post in July.

(Testimony of Jesse Noble.)

Q. (By Mr. ERWIN.) Do you know it was put up?

A. I was over there myself and saw it a little bit later, and he told me about the—

Mr. ERWIN.—We object to what somebody told him, as being hearsay.

The COURT.—Tell what you saw with reference to the notices.

A. I saw the notice on the upper end, and posted one on the lower end myself.

Q. (By Mr. FRAME.) What time in 1910 did you post this notice?

A. That must have been along about the first of August, 1910.

Q. What did this notice state?

A. It stated practically the same. I couldn't word it just the words, but anyway, giving notice that the claim owners wouldn't be responsible for any debts contracted by the laymen.

Q. Who was in possession of the ground at that time?

A. Mr. Jern was in possession at that time.

Q. In August, 1910?

A. Yes. No, Mr. Jern and Mr. Erickson both were there at that time. They both were working together previous to the time Jern took it over himself.

Q. You may state what you did with reference to keeping notices posted on the ground.

A. I kept the notices posted until spring. Then, after Mr. Jern closed down, the notices were still on,

(Testimony of Jesse Noble.)

and I had some of the other gentlemen take them in and save them late in the fall last year.

Q. Late in the fall.

A. Yes, along in September sometime.

Q. Did you post any notices after you had posted these notices in August, 1910? [114]

A. Yes. The notice on the upper post was renewed once after that. The notice that Mr. Erickson put up was a typewritten notice, and I am positive that Mr. Hess—I wouldn't be real sure, but I think Mr. Hess gave it to me to put up.

Q. I call your attention to this and ask you to state to the Court what that is. (Hands paper to witness.)

A. This is a notice I writ out the best I could myself and posted it on the lower center post.

Q. When did you post that notice?

A. The exact date I wouldn't be positive of, but this notice was posted late in the fall. It was the beginning of winter 1910, as near as I remember it. The other notice that I had posted was destroyed, and I put this one up in the place of it. I posted two notices on that post.

Q. I will ask you if you are able to make out the writing on that.

A. I think I can by studying it a little. It has got pretty dim, but I think I can make it out.

Q. (By Mr. ERWIN.) Is that your writing?

A. Yes, this is my writing.

Mr. FRAME.—I offer this in evidence and ask that it be marked Exhibit 4. (Paper marked Defendants' Exhibit 4.)

(Testimony of Jesse Noble.)

Q. State what that notice contains.

[Defendants' Exhibit No. 4.]

A. (Reading Exhibit 4.) "Notice" it says on top. "To whom it may concern. We, the claim owners, are not responsible for any debts contracted or any materials furnished or any wages contracted or materials furnished by laymen or any indebtedness whatsoever. L. C. Hess. Ben Boone. By Jesse Noble, agent."

Q. That notice you say was posted at the lower center stake?

A. That was the notice that was on the lower center stake.

Q. When did you take that down?

A. That was taken down by Mr. Marston and Mr. Shon last fall. [115]

Q. What is that paper you hold in your hand now?

A. This is the notice that was on the upper center post, that I renewed in place of the one that was there before.

Q. When did you put this notice up?

A. I put this notice up in March.

Q. What year?

A. 1910. No, in March, 1911. This is the renewal of the notice that was there.

Q. So that the notice you put up renewed the notice that Mr. Erickson had put up— A. Yes.

Q. The typewritten notice? A. Yes.

Q. (Mr. ERWIN.) Is this notice in your handwriting also? A. Yes, sir.

Mr. FRAME.—We offer this notice in evidence.

(Testimony of Jesse Noble.)

Mr. ERWIN.—No objection.

The COURT.—It may be marked.

(Marked Defendants' Exhibit 5.)

Q. (By Mr. FRAME.) Now, Mr. Noble, state whether these notices were posted in a conspicuous place or in a place where they could be easily seen by the men at work upon that ground.

Mr. ERWIN.—We object to that. Let him tell how they were posted and let the Court determine whether it is conspicuous or not.

The COURT.—He may do both. He had better first state what he did do, give a description of the post and whether it was surrounded, etc., and then express his opinion as to whether they could be seen. But let us get the facts first.

A. I considered at the time that those were the most conspicuous places to post them. It was a permanent place for them, that is, in reference to any work or anything to keep them from being torn down. At the time those were posted, Mr. Erickson [116] and Mr. Jern had had a boiler-house there, and they had moved their boiler out of the boiler-house and said they were going to tear it down. That is one reason why I didn't at that time ask Mr. Erickson to post one on the boiler-house. And the cook-house was off the claim. And on the upper center post—I didn't know where I could get it in a better place, because the ditch went within fifteen feet of it, a regular path they have to go up and down to attend to the water and get their water. And I considered it—I spoke to Mr. Erickson at that time, if he remem-

(Testimony of Jesse Noble.)

bers—that I thought there was the best place for the notice.

Q. Were you upon the ground in the spring, in May, 1911? A. Yes.

Q. Do you know of the work that was being done there then? A. Yes, sir.

Q. What was that work?

A. Sluicing the dump that was out.

Q. Was the work being done there in the nature of an improvement or development of the ground?

A. No. That was sluicing the dump and taking away the proceeds as near as I could figure it out.

Q. You took possession of this ground in the beginning of June, 1911, did you not? A. June 7th.

Q. Was there any cribbing done there?

A. No. The shaft wasn't cribbed up at that time.

Q. Was there any cribbing made?

A. There was cribbing for about eight feet of the shaft. The balance I purchased from the boys that had the sub-lay above us, and finished cribbing the shaft.

Q. You have been engaged in placer mining for some time? A. Yes.

Q. How long? [117]

A. About thirteen years.

Q. How long would it take a man to make the amount of cribbing that you found there?

A. Well, a man to saw and block the ends of that off—it could not take him over a day, the amount of cribbing that was there at the time I went there.

Mr. FRAME.—That is all.

(Testimony of Jesse Noble.)

Cross-examination.

(By Mr. ERWIN.)

Q. Who prepared the typewritten notices?

A. I won't be certain whether Mr. Hess gave them to me or not, but I am inclined to think he gave them to me and asked me to have them put up.

Q. You say you gave them to Mr. Erickson?

A. Yes.

Q. Where was he at the time?

A. He was on the claim at the time I gave them to him.

Q. Did you see him post the notices?

A. No, I didn't.

Q. How long after did you see the notices?

A. I don't think it was more than a week or such a matter.

Q. Did you see the notice posted on the upper stake?

A. On the upper center post, and he told me he didn't post one on the lower center post at that time.

Q. But you had told him to post one on the lower center, had you not? A. Yes.

Q. What time of year was that?

A. June or July, I won't be right positive to the day, but I am inclined to think it was along about the first of July.

Q. You went up to the upper stake at that time?

A. The next time I came over, which was within a week, I was up close to the center post, or up that way, and saw that there was a notice on the post.

(Testimony of Jesse Noble.)

Q. How close to the post did you go at that time?

A. I went right over to it at that time.

Q. How close would you have to go to that post before you could see that notice?

A. You could see it from Mr. Jern's workings. You remember the day you were out there I pointed it out to you?

Q. Could you see it at that time half that far?

A. Yes, sir.

Q. How far was that from his workings?

A. It was about four hundred feet, between four and five hundred feet I would judge.

Q. How far from the ditch line would you say?

A. It came within a step of the ditch, within 15 or 20 feet, something like that, from the ditch that goes along there.

Q. You testified that the man who attended the boiler had to go by there to get his water for the boiler?

A. No, I didn't.

Q. I understood you to say they had to go by there, pass by there to get water.

A. For sluicing, and in building the ditch, and so on.

Q. Now, after that notice was posted, when did you go there again to see if it was posted?

A. I was over there in March some time, and then I went around to the posts to see if they were still up.

Q. In March, 1911? A. Yes.

Q. Did you find a notice then?

A. No, the notices that were on there—that was, the one that was left there, as I understood it, on the

(Testimony of Jesse Noble.)

upper end I renewed. But the old notice down at the lower end was still there.

Q. Have you any idea when that notice disappeared from the upper post? [119]

A. Well, it must have disappeared in the winter some time, in the early part of the winter, some time during the winter.

Q. So you renewed that in March, 1911?

A. Sometime. I couldn't be positive as to the date. It was some time along about that time. Anyway, it was some time before sluicing.

Q. Which one of those notices (handing to witness two papers) did you post there at that time?

A. This (indicating) is the old notice on the lower center post.

Q. Is this the notice that you posted on the upper center post (indicating)?

A. Yes, this is the notice on the upper.

Q. This is Exhibit 5?

A. I don't know what exhibit it is.

Q. It is marked Exhibit 5 on there?

A. Yes. That is what fooled me when I first looked at it.

Q. This is the notice that you posted at that time?

A. Yes, sir.

Q. How long did that notice remain posted?

A. It remained there until I had those gentlemen take it down that I just told you about.

Q. When did they take it down?

A. Either the last of August or in September last year.

(Testimony of Jesse Noble.)

Q. Why did you have them take it down at that time?

A. I wanted to have it for this purpose, and I thought it was better to have somebody else out there than myself.

Q. You didn't date these notices when you put them on there? A. No, I didn't.

Q. There is no way of telling when you posted them other than your recollection? [120]

A. No, I didn't date them. I see that by the notice. In fact, I don't believe the others were dated. I am not positive. They may have been.

Q. This Exhibit 5 was posted in March, 1911?

A. Sometime in March, as near as I remember.

Q. And remained posted all summer until August, was it?

A. Until either the last of August or September. They will probably be able to tell the time they took them down. I don't remember the date.

Q. This is in your handwriting, all of it?

A. Yes. That is about as good as I can do.

Q. Exhibit Number 4, so marked here, is your notice that you placed on the lower post. A. Yes, sir.

Q. State what time you posted that.

A. That was posted in the fall previous to that, that is, sometime along the early part of the winter, as near as I remember. I don't remember the exact date.

Q. In the early part of the winter?

A. But there was one still posted before I posted that.

(Testimony of Jesse Noble.)

Q. Who posted that?

A. I posted that other one myself also.

Q. How long did that remain posted?

A. I couldn't state exactly how long, but anyway at the time I posted that one (indicating) it was gone, and I put that on in place of it, and that was sometime in the early part of the winter.

Q. Was there snow on the ground when you posted it? A. I think there was a little snow.

Q. How much snow? A. I couldn't state.

Q. Any trail running down to that post? [121]

A. No, I don't think there was.

Q. The laborers didn't have to go down that way to go to work?

A. No, not by the lower center post.

Q. You testified that this identical notice remained on that post from that time until last fall when you had it removed.

A. Yes, it is the same notice that I put up.

Q. This notice bears no date.

A. No, I didn't date it.

Q. What is the condition around that lower post as to growth of brush?

A. There is but very little there, in fact, the old tailings is around close to the post. As far as the brush is concerned, there is nothing only little shrubs that are here and there.

Q. Were those tailings from the workings of Ed Jern?

A. They were from the first workings there. They are from Mr. Wrand and Mr. Nelson, the parties that

(Testimony of Jesse Noble.)

had the first sub-lay from Erickson.

Q. Were the tailings around the post when you put the notice on?

A. Yes. That ground was the first ground that was worked. Down at the lower center stake the tailings are scattered around there. They might not be just up against the post, but they are close.

Q. How high does that post stand above the ground?

A. Some place in the neighborhood of four and a half feet or five feet high. It is a tree cut off and squared for the initial post—

Q. How large a tree?

A. I judge I am safe in saying it will square four inches, I believe.

Q. What work was going on on the ground when you posted this notice Exhibit 4 on the lower post?
[122]

A. I think Mr. Anderson and Mr. Wren and those boys were fixing the ditch, building a ditch and fixing up their winter quarters. They were enlarging the ditch. The ditch was built previous to that, but they all went together and enlarged the ditch so it would carry more water the following summer.

Q. Did they have laborers employed?

A. They had begun to hire some laborers at that time, yes.

Q. What improvements were on the claim at that time such as boiler-houses, messhouses and bunk-houses?

A. At the time that notice was put up Mr. Jern's

(Testimony of Jesse Noble.)

boiler-house was up, but the people that were working above Mr. Jern had quit and gone. The mess-house that was being constructed, the cabins in general, the bunkhouse, was off of the claim altogether right on the claim adjoining, up on the benches.

Q. Where did these laborers sleep when they were working for Jern, off the ground?

A. Yes. He had two different bunkhouses there. One was up—One bunkhouse where Mr. Gustafson and Mr. Anderson were stopping was on 3 above, and the other bunkhouse—a small bunkhouse—on 2 bench, across the line from the creek claim.

Q. There is a corner stake near the trail as you are coming onto number 2 Wolf Creek, is there not, very plain to be seen there, right near the trail where all the travel to and from the claim passes?

A. Yes, there is a corner stake of—I don't know whether it answers for the two claims or for the one, but I think it answers for the two claims.

Q. Wouldn't that have been a more conspicuous place to put that notice, instead of down in the flat at the lower stake?

A. I don't think it would have been as permanent a place as down below.

Q. That stake is still there? A. No, it is down.
[123]

Q. How long has that stake been down?

A. I couldn't say. But one of the boys was telling me the other day—I didn't see it myself—but he told me he couldn't find that post there.

Q. That post was near the trail right where it could

(Testimony of Jesse Noble.)

have been seen easily in coming onto the claim?

A. Yes, that was close to the trail.

Q. Going to and from Cleary from your claim, you passed right close to that post? A. Yes.

Q. But there is no trail going down the center of the claim past the lower center post?

A. No, there is no permanent trail down there at all that I know of.

Q. During the winter months would that post be covered with snow?

A. Well, the post wouldn't be snowed under. There might be snow on the post, but I don't think it would ever drift enough to snow that post up, because it is too high.

Q. There was considerable snow the winter of 1910-11 was there not out there?

A. In 1910 there was considerable snow.

Q. That was during the time this notice was posted? A. Not that winter, no.

Q. You say you posted this notice, Exhibit 4, on the lower center post in March, 1910?

A. Yes, that is right.

Q. There was considerable snow at that time?

A. That was a bad winter for snow, although the weather was mild at that time. On the upper post it was posted on.

Q. You say you took possession of the lay on June 7th, 1911?

A. I think that is about the date. I wouldn't be positive. [124]

Q. What was the occasion of your taking posses-

(Testimony of Jesse Noble.)

sion at that time?

A. Mr. Jern had surrendered his rights to it, and I wanted to save the shaft that was there that was not timbered, because it would only be a short time until it would collapse and it would probably ruin the block of ground that was blocked out.

Q. In what way did he leave? You say he threw up the lay?

A. Yes, he surrendered the lay to the owners.

Q. When you went there, did you find he had left the sluice-boxes and the gold in the boxes?

A. Yes, sir.

Q. (Continuing.) And black sand there?

A. I found an attachment on the boxes too.

Q. As a matter of fact, you cleaned up considerable of that money—gold-dust, out of that.

A. I cleaned up those boxes, yes, sir.

Q. And paid off the attachment? A. Yes, sir.

Q. And you had considerable money left that you could have applied on these labor claims, did you not?

A. No, I did not.

Q. Didn't you promise some of these boys at that time that you would pay them what was left over after paying the attachment?

A. Yes. I told them if they wanted to work, go there and help me at the time, they could take their wages, dig their wages—

Mr. FRAME.—We object to that as irrelevant, incompetent and immaterial. It has nothing to do with their rights to a lien.

Mr. ERWIN.—I want to show that there was

(Testimony of Jesse Noble.)

money that Jern left there that could have been applied on these claims.

Mr. FRAME.—This is an action for a lien which the statute provides. Any separate agreement that Noble may have made could not abridge their rights or enlarge them, or extend them. They have brought their action here, and must stand or fall upon [125] that. What agreement they may make with Mr. Noble is not material.

Mr. ERWIN.—I want to show to the Court that when Noble went into possession of that lay, he took it over with the gold and gold-dust in the boxes which was the result of the labor of these lien claimants and should have gone to pay their labor claims if he had carried out his promise to them, and it is material in the foreclosure of the lien. A man should do the best he can to pay the labor claims.

The COURT.—Proceed.

Q. (By Mr. ERWIN.) You have an interest in this ground at this time? A. No, sir, I have not.

Q. You do not claim to be an owner of the ground or liable for any of this?

A. I am no owner of the ground at the present time.

Q. Do you know anything about the custom of miners or owners of claims of posting notices to limit their liability for labor in this district?

A. Well, any ground that I am representing, or any ground I own, I have generally kept notices up on it where there was labor being hired to operate.

Q. Where do you usually post those notices?

A. That would depend. Post them some place

(Testimony of Jesse Noble.)

where they could see them, some conspicuous place.

Q. Your main object in posting these notices that you testified you did post, was to give notice to the laborers on that claim? A. Yes, sir.

Q. You wish to tell the Court now that you posted them in the most conspicuous place, where they could be easily seen on the claim at that time?

A. Yes, sir, I consider that was the best place on the claim that I could post them at that time. [126]

Q. Notwithstanding, that work was going on in the center of the claim where the laborers were engaged in work, and there were boiler-houses there, this was the place where they would be most apt to see the notice?

A. At the time I stated about those first notices, there was practically no boiler-house on the claim. As far as the messhouse and other houses, they were not on the claim. There was nothing to hinder them from seeing those notices from any work going on on the claim, without it would be on the upper end where Foster and that outfit had a sub-lay at the extreme upper end of the claim. Those notices could be seen from any place, passing along, if a man wanted to look down and see them.

Q. The laborers working on the Jern lease would have to go over the ground of the other lessees to the upper post to see that notice posted there.

A. No, you could see that notice from Jern's boiler-house, as I pointed out to you.

Q. Could you see what it was, without going up there?

(Testimony of Jesse Noble.)

A. No, you couldn't see to read it without going up to it.

Q. And you wouldn't know what kind of a notice it was? A. No, certainly you wouldn't.

Q. When you posted that notice in March, 1911, there was quite a lot of work going on on the claim. You had a permanent boiler-house at that time?

A. No. The boiler-house, I think, at the lower end was still off the claim sitting on the bench.

Q. When I was out there last year, was that boiler-house, where I met you, on the claim? A. Yes, sir.

Q. Was that there in March? A. Yes, sir.
[127]

Q. That boiler-house was on the claim?

A. Yes.

Q. There was where most of the labor was being done at that time, around that boiler-house?

A. Yes. There is where Mr. Jern's crew were working.

Q. That was the only work being done on the claim at that time on that Jern lay right there?

A. At the time you went out there I believe it was.

Q. And the work that had been done there from March on, was on that block of ground?

A. No. The boys were working on the lower end too.

Q. What boys were working down there?

A. Mr. Anderson and Mr. Wren.

Q. Were they employing labor there?

A. I think they did hire some, but not a great many though. I wouldn't be positive about that, but I

(Testimony of Jesse Noble.)

think they had some labor hired sometime during the working.

Q. You wouldn't be positive about that?

A. No, I wouldn't be positive about that.

Q. Jern was hiring quite a few men?

A. Yes, Jern was hiring quite a few men.

Q. He was working in the center of that claim about seven or eight hundred feet from those end stakes?

A. No. His last shaft was about a little over three hundred feet from the upper center post, as near as I recollect.

Q. His last shaft was? A. Yes, sir.

Q. That was in the new block of ground that he started to open up? A. Yes, sir.

Mr. ERWIN.—That is all.

Mr. FRAME.—That is all.

(Continuance until 10 A. M. April 2, 1912.) [128]

April 2d, 1912, 10 o'clock A. M.

Trial resumed.

[**Testimony of Charles E. Schon, for Defendants.**]

CHARLES E. SCHON, a witness for defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FRAME.)

Q. What is your name?

A. Charles E. Schon.

Q. What is your business? A. Mining.

Q. You live in the Fairbanks District, do you?

A. Yes.

(Testimony of Charles E. Schon.)

Q. Are you acquainted with that claim known as creek claim Number 2 Above Discovery on Wolf Creek? A. To a certain extent.

Q. Did you ever work there? A. Yes, sir.

Q. When was that?

A. For the last year and a half.

Q. Are you there now? A. Yes.

Q. Are you working on 2 Above Wolf Creek now?

A. 2 Above.

Q. Were you there during the summer of 1911?

A. Yes, sir.

Q. What time? Give the month if you can.

A. I was living on there practically all summer—

Q. Were you there in May, April—

A. But I was working on 3, and I was living on 2.

Q. Were you there in the month of May?

A. Yes, sir.

Q. Or April? A. Yes, sir.

Q. Did you see any notices of any kind on the claim at that time?

A. Well, I seen a notice on the upper stake in the month of May sometime. [129]

Q. What did that notice contain, do you know? Did you read it?

A. Yes. It says that the claim owners was not responsible for any wages or any debts contracted or any materials furnished, something to that effect, by the laymen.

Q. By whom was this signed; do you remember?

A. It was signed by Jesse Noble, Ben Boone and Luther Hess.

(Testimony of Charles E. Schon.)

Q. Was this notice posted on creek claim No. 2 Above? A. Yes, sir.

Q. Are you acquainted with Ed Jern? A. Yes.

Q. What work was being done on this claim in the month of May, 1911, by him?

Mr. ERWIN.—If he knows.

A. He was sluicing the dump.

Q. (By Mr. FRAME.) You were there on the ground at that time?

A. Yes. Most of the time.

Q. What were you doing yourself?

A. I was sluicing in my dump.

Q. Whereabouts was that dump of yours?

A. About three hundred feet below where Ed Jern's dump was.

Q. Was it on the same claim?

A. On the same claim.

Mr. FRAME.—That is all.

Cross-examination.

(By Mr. ERWIN.)

Q. Where did you say you saw this notice posted?

A. On the upper end of Number 2 creek claim.

Q. How was it posted; in what manner?

A. It was posted on the spruce stake, a spruce tree cut off maybe four and a half or five feet high, and squared off to about maybe three and a half inches square, and the notice was posted on the lower side of the post.

Q. You mean facing the claim?

A. Facing the claim. [130]

Q. Were you right up to this post to see the notice?

(Testimony of Charles E. Schon.)

A. The first time when I saw it I only went up the ditch and I didn't know what was the reading on it. I thought it was something pertaining to the location notice, so I never went to read it.

Q. You had no idea then that it could be a notice that the owners had put up.

A. No, not pertaining to—

Q. (Interrupting.) You thought it was a location notice on the post?

A. No, I never went around it.

Q. That was your first thought, that it must have something to do with the location of the claim?

A. That was the idea. Anyway, it didn't interest me enough to go and look to see what it was.

Q. Did anybody ask you to see it? A. No.

Q. Or did you go over from curiosity?

A. Yes, later on.

Q. Did you read the notice? A. Yes.

Q. Was it plain at that time?

A. Yes. I could read it and could make it out.

Q. Did it look like it had just been put up there recently?

A. I couldn't say how recently. It had been there sometime. I could see that.

Q. Did it look as if it had been through a rain or two? A. I couldn't say that.

Q. Was it in pencil writing?

A. Yes, in pencil writing.

Q. It was not a typewritten notice? A. No.

[131]

Q. Where upon that claim were you when you first

(Testimony of Charles E. Schon.)

got sight of this notice?

A. I was walking up along the ditch up to the dam.

Q. How far from the post?

A. Well, that post, to be exact, is twenty-eight and a half feet from the ditch.

Q. In what direction would that be from the ditch, right along the line of the claim?

A. Right across the claim like, from the ditch to the stake.

Q. So, from in front of the stake, would you be on the ditch so you would be sort of facing the notice, or would you be behind the notice when you were looking at it from 28 feet?

A. I would be kind of sideways.

Q. And you would be standing on Number 2 when you could see the notice, on Number 2 creek claim?

A. Oh, yes.

Q. How does that ditch run? Does it make a bend around and go behind the post across 3?

A. No. It don't go behind the post, but just a little bit above the stake the ditch makes a turn like.

Q. And starts across the creek?

Q. (By the COURT.) Imagine that that table the stenographer is sitting at to be the claim. Tell us where the ditch runs.

A. (Illustrating by using table.) Straight along here. Call this the dam at the end of the table.

Q. The other end of the table is the upper end of the claim.

A. Call this the dam. Here comes the ditch.

Q. Is the ditch on the claim?

(Testimony of Charles E. Schon.)

A. Yes. The upper 200 feet is on Number 3. Here is the stake; and here is the boundary line between 2 and 3.

Q. Do as I ask you to. Imagine this table to be Number 2. Put 3 off there in space. [132]

A. This is the dam. The upper end of the ditch would be up here like. Anyway, when the ditch comes down on 2, she— That is on 3 where she has that turn. She goes up on a turn like that. Then, as far as I remember, she takes through 2 that way.

Q. Where would the stake be on which the notice was posted on Number 2?

A. The stake would be here. She measures twenty-eight and a half feet from the ditch. Here is the ditch running, and $28\frac{1}{2}$ feet, the stake would be here.

Q. I thought you said at the upper end of the claim. You are indicating now the middle of the claim. Now, take that end of the table as the upper end of the claim.

Mr. HESS.—The ditch is on the other side of the claim.

The COURT.—Here is your claim running down Wolf Creek. Now indicate the side on which the ditch is. Correct yourself. Which limit is the ditch on?

A. It is about in the center of the claim I should judge.

Q. Which corner of the claim was the post on on which you saw the notice? Coming down stream, would it be right or left?

A. The post with the notice on is about in the cen-

(Testimony of Charles E. Schon.)

ter of the claim.

Q. Which side of the ditch is it, coming downstream, on the right or left side?

A. On the left-hand side.

Q. Towards you if the ditch was in the middle of the claim? A. Yes.

Q. (By Mr. ERWIN.) What month was it that you saw the notice?

A. It was sometime in May, but I couldn't say what date it was.

Q. In May, 1911? A. Yes, sir.

Q. Was that the first time you had seen that notice there? A. Yes, sir. [133]

Q. Was that after sluicing had begun or before?

A. Well, I couldn't say. I know I was through with my sluicing but I was through around the 17th or 18th.

Q. You would recognize that notice if you saw it now?

A. Well, I can't exactly remember the wording, but there was something to that effect, that the claim owners was not responsible for any debts contracted by the laymen.

Q. (By the COURT.) Had you been up and down the ditch before you saw the notice the first time?

A. Yes, I think I had been up once or twice during the spring, but my partner, Mr. Wickstrom, at that time was always attending to the water and I was very seldom up there, but I was up there once or twice.

Q. (By Mr. ERWIN.) When did you first go up

(Testimony of Charles E. Schon.)

the ditch that spring, how early in the spring?

A. I can't exactly remember the date, but it was in the latter part of April.

Q. You say you were continually going up there, nearly every day?

A. No. I said I was up there once or twice during the time we were sluicing our dump.

Q. Before you saw the notice? A. Yes.

Q. Didn't you notice it until you had been up there two or three times?

A. Yes, something like that.

Q. Then, you didn't go over to see it. You thought it was a location notice, had something to do with the location of the claim? A. Yes.

Q. Then, after that, how long was it before you went over to read the notice? [134]

A. It was somewheres in the latter part of May.

Q. Was it easy to get over to that stake; any trail over there?

A. There was no trail, but it was easy to get over there.

Q. Was there considerable underbrush around the stake, or was it all cleared off?

A. There is no underbrush at all, but small spruces two or three feet high some of them, but very few.

Q. Were there any high enough to hide that notice? A. No, nothing to hide it.

Q. You say there is no trail running past there nearer than the ditch, 28 feet?

A. No, not that I know of.

Q. I hand you Defendants' Exhibits Numbers 4

(Testimony of Charles E. Schon.)

and 5, and ask you which one of those notices you read on that post?

A. This is the one (indicating).

Q. That is the notice. Then, you say Defendants' Exhibit 5 is the one that you saw posted on the upper post of Number 2, Wolf Creek? A. Yes, sir.

Q. Did you ever see a notice on the lower post?

A. No. I saw one when I took it down. I saw that later on. I never went around to see what that contained when the writing was on it.

Q. Did you read that notice (handing witness Defts.' Exhibit 5)?

A. It looks very much like the one that was there.

Q. Read it.

A. (Reading.) "To whom it may concern: We the claim owners will not be responsible for any wages or any other indebtedness contracted by laymen, on said claim" I think it is.

Q. And you are pretty sure that is the notice you saw at that time?

A. It looks very much like it. [135]

Q. (By the COURT.) I gathered from what you said that you took that notice, as well as the one from the lower end of the claim, off last fall? A. Yes.

Q. (By Mr. ERWIN.) What time last fall did you take it down?

A. Well, if I ain't mistaken, I think it was some time in October.

Q. And that is the same notice that you saw in May? A. It looked very much like it, yes.

Q. Did you know about any notices being posted

(Testimony of Charles E. Schon.)

the year before in the fall? A. No.

Q. You were on the claim at that time, were you not? In the fall of 1910? A. Yes.

Q. A layman there? A. Yes.

Q. On Number 2, Wolf Creek? A. Yes.

Q. Did you know that notices were posted that fall? A. No.

Q. Were you employing labor during the winter?

A. No.

Q. Then, the first time you knew of the notices, was in the month of May, as you state, 1911?

A. Yes.

Q. Did you help repair the ditch during the spring sluicing?

A. I helped to shovel out the snow in the winter.

Q. Was there considerable snow there that winter and in the spring? A. Not very much.

Q. Were these posts covered with snow to some extent?

A. No, they couldn't be. There wasn't that much.

Q. How many feet of snow fell on the creek that winter? A. I judge about two feet on the level.

Q. You don't think there would be any more than that? A. No. [136]

Q. How high on the post would this notice be tacked?

A. It was tacked on the upper end of the stake, and I would judge the stake to be around four and a half or five feet high.

Q. And the notice would be about four feet high from the ground?

(Testimony of Charles E. Schon.)

A. She is more than four feet. I think it is close to five feet, four and a half or five feet high.

Q. While you were shoveling out the snow out of the ditch, you didn't see the notice? A. No.

Q. It was there at that time, or do you know?

A. I imagine it was.

Q. If it had been there at that time, you could have seen it, couldn't you?

A. I suppose if my thoughts were going that way, or looking for anything like that, I would have seen it.

Q. Did that ditch give you considerable trouble during the spring sluicing?

A. No, not as long as we were sluicing.

Q. You sluiced up first, before Jern sluiced?

A. We were sluicing at the same time.

Mr. FRAME.—We object to that as immaterial, irrelevant and not cross-examination.

The COURT.—It is in a way, but I want to be informed in this matter. This gentleman was out there on that claim, and it is proper that the examination take in all the time that he was there.

Q. (By Mr. ERWIN.) Now, did you see the Jern boys working on the ditch at any time, repairing it?

A. Yes. I did.

Q. How many times did you see them repairing it?

A. I couldn't say that. As long as I was sluicing, if there was any repairing to be done, we all went up there. [137]

Q. By "we all" you mean all the laymen?

A. All the laymen; Mr. Anderson, and Jern's men,

(Testimony of Charles E. Schon.)

and myself and partner.

Q. Did you have to go up quite often?

A. No, not as long as we sluiced.

Q. You sluiced early, you say, before the frost was out of the ground. Is that right?

A. Yes, we were through between the 17th and 20th of April.

Q. Were you on the ground after that, while they were sluicing the Jern dump? A. Yes.

The COURT.—I thought you were asking these questions to show his familiarity with this stake. You are now going off on a different trail from what you started on.

Mr. ERWIN.—That is all.

Mr. FRAME.—That is all.

Mr. FRAME.—That is our case.

Defendants rest.

[Testimony of John H. Anderson, for Plaintiff (in Rebuttal).]

JOHN H. ANDERSON, witness for plaintiffs in rebuttal, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. ERWIN.)

Q. What is your full name?

A. John H. Anderson.

Q. What is your business? A. Miner.

Q. Where do you reside?

A. I reside at the present time at 4 Above on Cleary.

Q. Are you acquainted with creek claim Number

(Testimony of John H. Anderson.)

2 Above Discovery on Wolf Creek?

A. Yes, sir. I worked two different lays on that claim. [138]

Q. During what time were you on 2 Above Discovery, Wolf Creek?

A. I started on the 19th of September, 1910, and got through about the 25th of May, 1911.

Q. Who did you have that lay from?

A. I had a sub-lay from Ed Jern on the lower two hundred and fifty feet, and I also had a lay from Mr. Hess and Mr. Schmidt on the bench adjoining the lower two hundred and fifty feet.

Q. Which limit does that bench adjoin, the left or right limit of the claim?

A. The right limit, going downstream.

Q. Do you know where the Jern lay was on that?

A. Yes.

Q. What portion of the claim was he working during the winter of 1910-11?

A. He started to work on the upper half, just about the upper half; and he was working in the middle of the claim, and he also started to work on the upper half of the claim.

Q. Who were your partners in that lay, if you had any partners?

A. I had two partners; Teddy Ray and Carl Anderson.

Q. Could you draw a plat of that claim showing how the— You know where the ditch is that supplies water for the sluicing?

A. Yes, sir, and we were all making the ditch in

(Testimony of John H. Anderson.)

the fall; Mr. Schon, and us three, and Ed Jern, all making the ditch on the upper part, also the lower part.

Q. Can you make a plat showing the ditch and the claim and the way the ditch runs, and the boiler house?

The COURT.—Let him follow that plan of showing on that table.

Mr. ERWIN.—I thought it might be better, to get it into the record, to have him draw a plat.

The COURT.—I will not be— —if you call your corners so that the stenographer can get it down [139]

Q. (By Mr. ERWIN.) Now, take this table as Number 2 Above Discovery, Wolf Creek. Will you just point out to the Court where the stakes were, that you know, on the claim? A. Yes, sir.

Q. And where the ditch was running?

A. Well, this is coming up from Cleary—

Q. That is the lower end of the claim?

A. That is the lower end, going upstream. Here we have the lower corner stake, and the trail about fifty feet alongside the lower corner stake going upstream.

Q. Is that trail on the claim or off the claim?

A. It is on the bench.

Q. How far off the claim would the trail be?

A. About fifty feet I should judge, may be more. And then, going up, the trail goes alongside all the way; the trail goes alongside the creek claim all the way except at the upper corner where I think the

(Testimony of John H. Anderson.)

trail goes a little in on the creek claim. Then in the middle— I had a boiler-house about sixty feet or seventy-five feet from the lower corner stake. Our boiler-house was standing just on the line between the creek and the bench. Then Mr. Jern has his boiler-house about two hundred feet further up. His boiler-house was standing on the creek claim. And then Ed Jern had his boiler-house about two hundred and fifty feet further up yet on the upper half—I couldn't tell—about that—which he put up last November.

Q. November of what year? A. 1910.

Q. Where was the ditch?

A. Well, the ditch coming in on the upper end of the claim, coming from the creek, was shooting up towards the bench like. Up here is the corner stake, and here is the center stake.

Q. The upper center stake of the claim?

A. The upper center stake. And the ditch was shooting down a [140] little below the center stake and then across the bench.

Q. How far is the ditch from the upper center stake?

A. Oh, I should judge about thirty feet, as near as I could tell. I never took any particular notice of the distance. Just passing by is all.

Q. Which side of the stake did it pass by, on which limit? A. Going downstream?

Q. Yes, going downstream.

A. The stake is on the left.

Q. The stake would be on the left-hand side and

(Testimony of John H. Anderson.)

about twenty-eight feet from the ditch?

A. Yes, about that.

Q. Does that ditch, as it comes down across Number 3 creek claim, sort of go across Number 3, or right straight through Number 3?

A. It goes across the creek on 3, and then after it goes on the lower part 250 feet, or below the 250 feet, on 2 it shoots towards the hill, because there is a deep hole and brushes.

Q. It goes behind the stake? A. Yes.

Q. You helped build that ditch, did you?

A. Yes, sir.

Q. When was the ditch built?

A. The ditch was built by Carl Erickson in the first place. But the three laymen—we worked on that ditch for two days, about seven or eight men for us, and made the ditch big enough to hold three sluice heads.

Q. When was that? A. In October, 1910.

Q. How long were you working along in October, 1910?

A. Well, we worked on the ditch for two days. That is the only work I did in the fall. [141]

Q. For how long? A. Two days.

Q. How much of that time would you be working along close to that upper center stake there of the claim?

A. Well, we were digging out the ditch there alongside of the stake. We were digging out the ditch going down, and the next day we went up together and finished up the work further up; and went by the stake two days.

(Testimony of John H. Anderson.)

Q. Did you see that stake there at that time?

A. Yes.

Q. Was there any notice of any kind on that stake in the shape of a notice on paper?

A. No, sir, not as I could take any notice of.

Q. Would you have seen a notice there at that time if it had been there?

A. If the notice had been put up so she would be noticeable, a man couldn't help himself from seeing the notice I shouldn't think, because a man is close on the ditch and he should see the notice.

Q. This was in October, 1910. A. Yes, sir.

Q. What other work have you performed on that ditch along there, and what time did you do it?

A. The next work we did on the ditch was the 20th of April, 1911, when we were cutting out the ice and getting the ditch ready for the water.

Q. About how much time did you put in on the ditch that time?

A. We all went up there one day, and was cutting out the ditch all along.

Q. How many of you?

A. We was two— About seven or eight I guess.

Q. That day you were cutting the ice out of the ditch— A. (Interrupting.) Yes, sir. [142]

Q. —did you notice the post that day, or see any notice on it?

A. I didn't see any notice. I noticed the post, because I went on the ditch bank going up, and I noticed the post, but I didn't see any notice.

Q. Were you up there after that?

(Testimony of John H. Anderson.)

A. Yes. We had to go up every day after the water commenced to run, because we was on the lower end of the claim, and Ed Jern always had a sluice head of water, and if there was any water over we had to go and look out for it ourselves to get the other sluice head. They were sluicing at the same time.

Q. How long were you sluicing and using the ditch?

A. From the 29th of April, I think it was, and we got through about the 24th I think of May.

Q. And you say that nearly every day you were up that ditch? A. Yes.

Q. And passed that upper center stake?

A. Yes, sir. It was generally too much water or not enough water, and we had to go up and look after it that we had enough water or too much.

Q. Did you ever see any notice on that upper center stake?

A. No, sir, not at any time. I never knowed or heard about any notice being there at the time I was working there.

Q. Let us go to the lower center stake. Do you know where that stake is?

A. Yes, sir. I had a lay adjoining the lower end of 2, on 1, and I was prospecting on 1, below this stake, sinking two holes.

Q. How close to the stake were you working?

A. I should think about seventy-five feet.

Q. Did you see that stake? [143]

A. We passed by the stake, because we were go-

(Testimony of John H. Anderson.)

ing to sink down below, so we looked up the stake.

Q. Where were you living at that time?

A. I was living in the middle of the claim on Number 2.

Q. When you went from your cabin to where you were sinking your holes, how close did you go to that lower stake?

A. I think I passed within ten feet, or so on, to that stake.

Q. (By the COURT.) When was this that you are talking about? A. In April, 1911.

Q. (By Mr. ERWIN.) How long did that continue, going up and down?

A. We were prospecting for eighteen days.

Q. Did you ever see any notice on that stake?

A. No, sir, and never heard anybody pass any remark that there was any notice there at that time.

Q. There was no notice there?

A. No, sir, no notice there.

Q. (By the COURT.) How many days did you say you were down there?

A. I was prospecting about eighteen days. I think if I am not mistaken, and we started to thaw the dump about the 18th or 20th of April, and that was before that.

Q. (By Mr. ERWIN.) What was the nature of the surroundings around that lower center stake with reference to small trees or brush? Could it be seen from a distance?

A. Well, she couldn't be seen from the road, because she was away down about four hundred and

(Testimony of John H. Anderson.)

fifty or five hundred feet—from the road like, and, except a man went especially there, passing by, then he could see the stake or notice in the summer-time but not in the winter-time.

Q. Was there any trail leading down by that stake? A. No, sir. [144]

Q. Was there any wood road? A. No.

Q. Or water road? A. No, sir.

Q. Or anything of that sort? A. No, sir.

Q. No special reason for the laborers on that claim to go down to that stake? A. No, sir.

Q. Or to the upper stake?

A. No, not in the winter-time, because there was no road or trail along that ditch.

Q. How much snow was there during the winter of 1910–11 out on Wolf Creek?

A. Quite a lot of snow, drifted snow in some places four feet high, and in some places less.

Q. Do you know how it was in the valley of the creek where these stakes were; was it deep enough to cover the stakes?

A. No, I wouldn't think it would be deep enough to cover the stakes. That lower corner stake wasn't covered anyway.

Q. You were living on the claim during that winter? A. Yes, sir.

Q. Do you know these lien claimants? Do you know Mr. Gustafson the plaintiff in this action?

A. Yes, sir. I know them all.

Q. Did you ever see them working on the ditch there? A. Yes, sir.

(Testimony of John H. Anderson.)

Q. How often did you see them on the ditch, and what time of the year was it?

Mr. FRAME.—We object to this as immaterial and incompetent, as evidence to fix the time or period or the amount of work they did.

Mr. ERWIN.—I don't care to bother with that.

The COURT.—As it is withdrawn, I will not pass upon it.

Q. (By Mr. ERWIN.) Your testimony is that you never saw any notices on that claim. [145]

A. No, sir, never.

Q. Never heard of any notices being posted?

Mr. FRAME.—We object to that as repetition.

The COURT.—Objection sustained.

Mr. ERWIN.—That is all.

Cross-examination.

(By Mr. FRAME.)

Q. You were working a lay on this ground during that time? A. Yes.

Q. You were not particularly interested whether there were notices posted on that ground or not?

A. I was.

Q. Why so?

A. Because I had a lay adjoining this lower center stake where this notice—

Q. Why were you interested in knowing whether there were notices there or not?

A. I was sinking, or passing by—

Q. You don't understand. You were not interested in whether there were notices on the ground or

(Testimony of John H. Anderson.)

not. It was not a matter of any concern to you, was it?

A. Well, I should think it did. I had one man hired during the winter.

Q. But you expected to pay that man yourself?

A. Yes, sir.

Q. You didn't expect him to look to the ground for his pay? A. No.

Q. You wouldn't pretend to say to the Court that as a matter of fact there were no notices posted on that ground, would you?

A. I would, because I couldn't see any notices there.

Q. Simply because you didn't happen to see them, you want to say to the Court that there were no notices posted there? [146]

A. I should think if there had been such a notice there, they ought to be visible at some time when a person passed by in the spring.

Q. You were not looking for notices? A. No.

Q. It didn't make any difference to you whether notices were there or not? A. (No answer.)

Q. You say you know all about these stakes on this claim? A. Yes.

Q. Did you ever see the lower right-hand corner stake? A. The lower?

Q. Did you ever see the lower right-hand corner stake? A. The one close to the main road?

Q. The lower right-hand corner stake of Number 2.

The COURT.—Make it plain.

(Testimony of John H. Anderson.)

A. The one next to the road. Yes.

Q. What kind of a stake is that?

A. A tall pole with a flag on it.

Q. (By Mr. FRAME.) Is that the only stake there? A. No, sir.

Q. Describe the surroundings there generally.

A. What?

Q. Describe the surroundings of the lower right-hand corner.

A. Well, towards the creek is the center stake, and further in the creek in the willows is the lower corner stake.

Q. Describe it with reference to stakes. Is that the only stake there?

A. The lower center stake is a—

Q. (Interrupting.) I want to know about this lower right-hand corner stake.

The COURT.—He is talking about that stake over there that he is indicating on the table. [147]

Q. (By Mr. FRAME.) Tell us about that. Is that the only stake there? A. No, sir.

Q. Are there other stakes there?

A. This long pole with a white flag on it is standing alongside the squared post, or a post about four or five feet high which is marked and squared.

Q. Is that marked; the lower right-hand corner of number 2? A. Is that marked?

Q. Yes.

A. Well, I should think it should be marked.

Q. Is it?

Q. (By the COURT.) Do you know whether it is

(Testimony of John H. Anderson.)

or not? Did you ever read it or know what is on the stake?

A. I was within five or ten feet of the stake, but I know perfectly well when I came there that that was the stake, and I had no business to go there and read the readings if there were any readings on the post.

Q. How do you know that is the lower right-hand corner stake of Number 2?

A. Because I had the lay adjoining this lay on 1 above.

Q. There are a number of stakes right around there, a number of other stakes right around there, around that same stake?

A. Yes, but the corner stake is a pole with a white flag on it.

Q. How do you know it is the corner stake on Number 2? A. How do I know?

Q. Yes.

A. I know it because it is the same kind of a pole with a white flag on at the upper corner stake.

Q. You know it because it had the same kind of flag on it that is on the upper corner stake?

A. Yes, it was, at the time I started there. [148]

Q. When were those flags put there?

A. That is more than I know.

Q. Were they there when you went on the ground?

A. They were there when I went on the ground, on the lower corner stake especially, as well as the upper.

Q. How far do you say this lower center stake is

(Testimony of John H. Anderson.)

from the trail?

A. Well, it is about four hundred feet, because the main road is about fifty feet from the corner stake.

Q. How wide is that claim? About 660 feet, isn't it?

A. I should judge, yes. Well, maybe not that wide, because it don't look that wide. I never measured it.

Q. Didn't you say that center stake was 500 feet from the trail, on your direct examination?

A. No, it can't be 500 feet.

Q. It is only about four hundred feet?

A. It is hard to tell, because I never measured it, but about four hundred feet.

Mr. FRAME.—That is all.

Redirect Examination.

(By Mr. ERWIN.)

Q. Was it your partner who testified the other day to putting up the notice on the upper stake? You heard the testimony of Erickson? Erickson was not your partner in that lay, was he? A. No, sir.

Mr. ERWIN.—That is all.

[Testimony of Isaac B. Wickstrom, for Plaintiff (in Rebuttal).]

ISAAC B. WICKSTROM, witness for plaintiffs in rebuttal, after being sworn, testified as follows:

Direct Examination.

(By Mr. ERWIN.)

Q. State your full name.

(Testimony of Isaac B. Wickstrom.)

A. Isaac B. Wickstrom.

Q. What is your business? A. Mining. [149]

Q. Are you acquainted with creek claim Number
2 Above Discovery on Wolf Creek? A. Yes, sir.

Q. Have you ever worked on that claim or had
anything to do with it?

A. Yes. I worked a lay there with Mr. Schon.

Q. You were a partner with Mr. Schon in the lay?

A. Yes.

Q. What portion of the claim did you have a lay
on?

A. Well, a little below the center of the claim I
should think.

Q. What portion of the claim did you have a lay
on? A. It was on the lower half.

Q. Was your lay adjoining the Jern lay?

A. Yes, sir.

Q. (Continuing.) —Where he was working dur-
ing the winter of 1910–11? A. Yes.

Q. How long were you on the claim?

A. Between seven and eight months.

Q. What was the date you went there?

A. The 24th of October, 1910.

Q. When did you quit?

A. We were through with the dump about the 18th
of May, 1911.

Q. Do you know where the lower center stake of
that claim is? A. No, I don't.

Q. Did you ever see that stake? A. No.

Q. Do you know where the upper center stake is?

A. No.

(Testimony of Isaac B. Wickstrom.)

Q. You don't know where that stake is?

A. I never seen it.

Q. Did you ever work on that ditch?

A. Yes. [150]

Q. How many times have you been up along that ditch?

A. That is hard telling, but I had to go up there mostly once a day that time we were sluicing, to regulate the water.

Q. You say you don't know where that upper stake is? A. No.

Q. And you never saw it? A. No.

Q. Did you know of any notices being posted on the claim? A. I don't.

Q. You don't know of any? A. No.

Q. You didn't know of Mr. Schon posting notices as he testified to the other day?

Mr. FRAME.—We object to that. (Sustained.)

Q. Did you have men employed? A. No.

Mr. ERWIN.—That is all.

Mr. FRAME.—That is all.

Mr. ERWIN.—Plaintiff rests.

Mr. FRAME.—We wish at this time to renew our motion and move for judgment in favor of the defendants on the ground that there is a total variance between the allegations of the complaint and the testimony that has been introduced by the plaintiff; for the further reason that the statute does not give a lien for any of the work that is proved to have been performed during the time for which liens are claimed. There is a total lack of evidence to sup-

port a judgment against the defendants Luther C. Hess, Ben Boone and Jesse Noble; for the further reason that there is a total lack of evidence to support a judgment of foreclosure of the liens; for the further reason that the testimony which has been introduced by the defendants in this case shows that notices were kept posted upon the ground [151] during this time, and that even if notices were not so kept posted, that the work and labor which the plaintiff and the lien claimants performed was performed in the operation of the property as a placer mine in extracting the gold-dust and the gold-bearing gravel therefrom, and for which work it has not been the theory of the law that notices of nonresponsibility shall be given.

The COURT.—If you have any authorities bearing on the point of the variance between the allegations of the complaint and as set out in the notices of lien, I will listen to it, but that is the only point.

Mr. FRAME.—I have no authorities with me at this time on that point.

The COURT.—The record may show that the motion is denied except as I may have occasion, as I said before, to ultimately sustain the motion as to possibly one of the liens. I shall have to review it in my mind, and I am not deciding now as to what the outcome will be as to one of the claims, but otherwise you may proceed with your argument.

Mr. FRAME.—We reserve an exception to the ruling of the Court.

The COURT.—An exception is allowed. [152]

Plaintiff's Exhibit "A."

For and in consideration of the sum of One Dollar, legal tender of the United States of America, to me in hand paid by Algot Gustafson, the receipt of which is hereby acknowledged, I hereby sell and assign to the said Algot Gustafson that certain claim covered by a lien filed by me against placer mining claim number Two above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Mining and Recording District, Territory of Alaska, said claim having been filed for record in the Recorder's Office in and for said Precinct, at Fairbanks, Alaska, on the 12th day of June, 1911, for the sum of \$190.00.

Dated at Fairbanks, Alaska, this 15th day of June, 1911.

THOS. WRIGHT. [153]

Plaintiff's Exhibit "B."

For and in consideration of the sum of One Dollar, legal tender of the United States of America, to me in hand paid by Algot Gustafson, the receipt of which is hereby acknowledged I hereby sell and assign to the said Algot Gustafson that certain claim covered by a lien filed by me against placer mining claim number Two above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Mining and Recording District, Territory of Alaska, said claim having been filed for record in the Recorder's Office in and for said Precinct, at Fairbanks, Alaska, on the 12th day of June, 1911, for the sum of \$62.50.

Dated at Fairbanks, Alaska, this 15th day of June, 1911.

GUST HONK. [154]

Plaintiff's Exhibit "C."

For and in consideration of the sum of One Dollar, legal tender of the United States of America, to me in hand paid by Algot Gustafson, the receipt of which is hereby acknowledged, I hereby sell and assign to the said Algot Gustafson that certain claim covered by a lien filed by me against placer mining claim number Two above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Mining and Recording District, Territory of Alaska, said claim having been filed for record in the Recorder's office in and for said Precinct, at Fairbanks, Alaska, on the 12th day of June, 1911, for the sum of \$145.00.

Dated at Fairbanks, Alaska, this 15th day of June, 1911.

KNUT J. PETERSON. [155]

Plaintiff's Exhibit "D."

For and in consideration of the sum of One Dollar, legal tender of the United States of America, to me in hand paid by Algot Gustafson, the receipt of which is hereby acknowledged, I hereby sell and assign to the said Algot Gustafson that certain claim covered by a lien filed by me against placer mining claim number Two above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Mining and Recording District, Territory of Alaska, said claim having been filed for record in the Recorder's office in and for said Precinct, at Fairbanks, Alaska, on the 12th day of June, 1911, for the sum of \$105.00.

Dated at Fairbanks, Alaska, this 15th day of June, 1911.

VICTOR ANDERSON. [156]

Plaintiff's Exhibit "E."

For and in consideration of the sum of One Dollar, legal tender of the United States of America, to me in hand paid by Algot Gustafson, the receipt of which is hereby acknowledged, I hereby sell and assign to the said Algot Gustafson that certain claim covered by a lien filed by me against placer mining claim number Two above Discovery, on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Mining and Recording District, Territory of Alaska, said claim having been filed for record in the Recorder's office in and for said Precinct, at Fairbanks, Alaska, on the 12th day of June, 1911, for the sum of \$114.00.

Dated at Fairbanks, Alaska, this 15th day of June, 1911.

CARL STRASS. [157]

Plaintiff's Exhibit "F."

Wolf Creek, June 7th, 1911.

I hereby promise to pay to A. Gustafson 29 days and Five Hours at the rate of \$5.00 Five Dollars a day.

ED JERN. [158]

Plaintiff's Exhibit "G."

*In the District Court for the Territory of Alaska,
Fourth Division.*

ALGOT GUSTAFSON,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C.

HESS and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess and Ed Jern, and all Others Whom it may Concern:

Notice is hereby given that Algot Gustafson claims a lien upon that certain placer claim and mine known as creek placer mining claim number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 291½ days' work and labor, at the agreed price of \$5.00 per day and board, amounting to the sum of \$114.50 that no part of said sum has been paid on account

thereof, and there now remains due claimant [159] for said work and labor, the sum of \$147.50, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 1st day of May, 1911, and ceased said work and labor on the 1st day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10 day of June, A. D. 1911.

ALGOT GUSTAFSON,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Algot Gustafson, being first duly sworn upon oath, deposes and says: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

ALGOT GUSTAFSON.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Official Seal] SAMUEL R. WEISS,
Commissioner and Ex-officio Justice of the Peace.

[Indorsed]: 34,095. District Court, Territory of Alaska, 4th Division. Algot Gustafson vs. Jesse Noble et al. Notice and Claim of Lien.

Territory of Alaska,
Fourth Judicial Division,—ss.

Filed for record at request of G. B. Erwin on the
12 day of June, 1911, at 55 min. past 1 P. M. and
Recorded in Vol. One, Liens, page 33, Fairbanks Re-
cording District.

JOHN F. DILLON,

Recorder.

By R. H. Geoghegan,

Deputy. [160]

Plaintiff's Exhibit "H."

*In the District Court for the Territory of Alaska,
Fourth Division.*

THOMAS WRIGHT,

Plaintiff,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C.
HESS and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess,
and Ed Jern, and all others whom it may con-
cern.

NOTICE IS HEREBY GIVEN, that Thomas
Wright claims a lien upon that certain placer mining
claim and mine known as Creek Placer Mining Claim
Number Two (2) above Discovery on Wold Creek
a tributary of Cleary Creek, in the Fairbanks Re-
cording District, Territory of Alaska, containing
twenty (20) acres of mineral land more or less, to-

gether with the tenements, hereditaments and appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property as cook for workmen engaged in digging tunnels, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts and also as a miner and laborer in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 68 days' work and labor, at the agreed price of \$5.00 per day and board, amounting to the sum of \$340.00; that no part of said sum has been paid except \$150.00 on account thereof, and there now remains due claimant [161] for said work and labor, the sum of \$190.00, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 1st day of April, 1911, and ceased said work and labor on the 9th day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said

work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June, A. D. 1911.

THOS. WRIGHT,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Thomas Wright, being first duly sworn upon oath, depose and say: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

THOS. WRIGHT.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Official Seal] SAMUEL R. WEISS,
Commissioner and Ex-officio Justice of the Peace.

[Indorsed]: 34,096. District Court, Territory of Alaska, 4th Division. Thomas Wright vs. Jesse Noble et al. Notice and Claim of Lien.

Territory of Alaska,
Fourth Judicial Division,—ss.

Filed for record at request of G. B. Erwin on the 12 day of June, 1911, at 55 min. past 1 P. M., and re-

recorded in Vol. One of Liens, page 34, Fairbanks Recording District.

JOHN F. DILLON,

Recorder.

By R. H. Geoghehan,

Deputy. [162]

Plaintiff's Exhibit "I."

*In the District Court for the Territory of Alaska,
Fourth Division.*

VICTOR ANDERSON,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C.
HESS and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and all others whom it may concern:

Notice is hereby given that Victor Anderson claims a lien upon that certain placer claim and mine known as creek placer mining claim number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting

gold-bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, developing and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 21 days' work and labor, at the agreed price of \$5.00 [163] per day and board, amounting to the sum of \$105.00; that no part of said sum has been paid on account thereof, and there now remains due claimant for said work and labor, the sum of \$105.00 after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 1st day of May, 1911, and ceased said work and labor on the 26th day of May, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatinika, Alaska, the 10th day of June,
A. D. 1911.

VICTOR ANDERSON,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Victor Anderson, being first duly sworn upon oath, deposes and says: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

VICTOR ANDERSON.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Official Seal] SAMUEL R. WEISS,
Commissioner and Ex-officio Justice of the Peace.

[Indorsed]: 34,097. District Court, Territory of Alaska, 4th Division. Victor Anderson vs. Jesse Noble et al. Notice and Claim of Lien.

Territory of Alaska,
Fourth Judicial Division,—ss.

Filed for record at request of G. B. Erwin on the 12 day of June, 1911, at 55 min. past 1 P. M., and recorded in Vol. One of Liens, page 35, Fairbanks Recording District.

JOHN F. DILLON,
Recorder.

By R. H. Geoghegan,
Deputy. [164]

Plaintiff's Exhibit "J."

*In the District Court for the Territory of Alaska,
Fourth Division.*

GUST HONK,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C.
HESS and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and all others whom it may concern:

Notice is hereby given that Gust Honk claims a lien upon that certain placer claim and mine known as creek placer mining claim number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working the same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben

Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 8 days, 9 hours' work and labor, at the agreed price of \$7.00 per day and board, amounting to the sum of \$62.50; that no part of said sum has been paid on account thereof, and there now remains due claimant [165] for said work and labor, the sum of \$62.50, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 16th day of May, 1911, and ceased said work and labor on the 1st day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June, A. D. 1911.

GUST HONK,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, *Hust Honk*, being first duly sworn upon oath, deposes and says: That I am the claimant named in

the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

GUST HONK.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Official Seal] SAMUEL R. WEISS,
Commissioner and ex-Officio Justice of the Peace.

[Indorsed]: 34,098. District Court, Territory of Alaska, 4th Division. Gust Honk vs. Jesse Noble et al. Notice and Claim of Lien.

Territory of Alaska,
Fourth Judicial Division,—ss.

Filed for record at request of G. B. Erwin on the 12 day of June, 1911, at 55 min. past 1 P. M., and recorded in Vol. One of Liens, page 36. Fairbanks Recording District.

JOHN F. DILLON,
Recorder.

By R. H. Geoghegan,
Deputy. [166]

Plaintiff's Exhibit "K."

*In the District Court for the Territory of Alaska,
Fourth Division.*

KNUTE PETERSON,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C.
HESS and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Bén Boone, Luther C. Hess and Ed Jern, and all Others Whom it may Concern:

Notice is hereby given that Knute Peterson claims a lien upon that certain placer claim and mine known as creek placer mining claim number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 29½ days' work and labor, at the agreed price of \$5.00 per day and board, amounting to the sum of

\$145.50; that no part of said sum has been paid except \$——— on account thereof, and there now remains due claimant for said work and labor, the sum of \$———, [167] after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 29th day of April, 1911, and ceased said work and labor on the 3rd day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June, A. D. 1911.

KNUTE PETERSON,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Knute Peterson, being first duly sworn upon oath, depose and say: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

KNUTE PETERSON.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Official seal.] SAMUEL R. WEISS,
Commissioner and ex-officio Justice of the Peace.

[Indorsed]: 34,099. District Court, Territory of Alaska, 4th Division. Knute Peterson vs. Jesse Noble et al. Notice and claim of lien.

Territory of Alaska,
Fourth Judicial Division,—ss.

Filed for record at request of G. B. ERWIN on the 12 day of June, 1911, at 55 min. past 1 P. M. and recorded in Vol. One of Liens, page 37. Fairbanks Recording District.

JOHN F. DILLON,
Recorder.

By R. H. Geoghegan,
Deputy. [168]

Plaintiff's Exhibit "L."

*In the District Court for the Territory of Alaska,
Fourth Division.*

CARL STRASS,

Claimant,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C. HESS
and ED JERN,

Defendants.

NOTICE AND CLAIM OF LIEN.

To the said Jesse Noble, Ben Boone, Luther C. Hess
and Ed Jern, and all Others Whom it may Con-
cern:

Notice is hereby given that CARL STRASS claims a lien upon that certain placer claim and mine known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of

Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, containing twenty (20) acres of mineral land, more or less, together with the tenements, hereditaments, appurtenances and improvements thereon or appertaining thereto, for work and labor done and performed by said claimant upon said property, as miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working of same; that the names of the owners and reputed owners of said mine and property described, are Jesse Noble, Ben Boone and Luther C. Hess; that the name of the person who employed claimant to perform said work and labor upon said mine and property, is Ed Jern, the person having charge of the construction and making of said improvements upon same as aforesaid; that such work and labor done and performed by claimant upon and in the construction of said improvements upon said mine and property as aforesaid, consisted of 19 days' work and labor, at the agreed price of \$6.00 per day and board, amounting to the sum of \$114.00; that no part of said sum has been paid on account thereof, and there now remains due claimant for said work [169] and labor, the sum of \$114.00, after deducting all just credits and offsets; that claimant commenced the performance of said work and labor on the 16th day of May, 1911, and ceased said work and labor on the 4th day of June, 1911, and thirty (30) days have not elapsed since claimant ceased to work and labor in making

and constructing said improvements upon said mine and property; that said work and labor were performed by claimant as aforesaid at the instance of the said defendants above named, and with the knowledge of each and all of them.

Dated at Chatanika, Alaska, the 10th day of June, A. D. 1911.

CARL STRASS,
Claimant.

Territory of Alaska,
Fairbanks Precinct,—ss.

I, Carl Strass, being first duly sworn upon oath, depose and say: That I am the claimant named in the foregoing notice and claim of lien; that I have heard the same read and know the contents thereof, and that I believe the same to be true.

CARL STRASS.

Subscribed and sworn to before me the 10th day of June, A. D. 1911.

[Official Seal] SAMUEL R. WEISS,
Commissioner and ex-officio Justice of the Peace.

[Indorsed]: 34,100. District Court, Territory of Alaska, 4th Division. Carl Strass vs. Jesse Noble et al. Notice and Claim of Lien.

Territory of Alaska,
Fourth Judicial Division,—ss.

Filed for record at request of G. B. Erwin on the 12 day of June 1911, at 55 min. past 1 P. M. and re-

recorded in Vol. One of Liens, page 38. Fairbanks Recording District.

JOHN F. DILLON,
Recorder.

By R. H. Geoghegan,
Deputy. [170]

Defendants' Exhibit No. 1.

F. N. B. FIRST NATIONAL BANK
United States Depository.

Fairbanks, Alaska, May 14th, 1911. No. 4.

Pay to the order of August Honk \$1313. One
Thousand three hundred and Thyrteen Dollars.

ED JERN.

(Stamped across face: "First National Bank.
PAID May 17, 1911. Fairbanks, Alaska. Receiv-
ing Teller.")

(Indorsed on back: "August Honk.") [171]

Defendants' Exhibit No. 2.

LAY OR LICENSE TO MINE.

THIS INDENTURE Made this 23rd day of March,
A. D. 1909, at Fairbanks, Alaska, by and between
Jesse Noble and Harry Buhro, party of the first part,
hereinafter called the lessor, and Charles J. Erick-
son, party of the second part, hereinafter called
lessee.

WITNESSETH: That the said lessor doth hereby
let, lease and demise unto the said party of the sec-
ond part, all that following described placer mining
ground, to-wit:

Creek placer mining claim Number 2 above Wolf
Creek, tributary of Cleary Creek, Fairbanks Min-

ing and Recording District; Also log cabin on said claim, from the date hereof until the 23rd day of March, 1912, on the following terms and conditions, to-wit:

THE SAID LESSOR permits the said lessee to enter upon the said ground for the said period, subject to the conditions herein set forth.

THE SAID LESSEE shall proceed immediately to said ground and at once commence the work of mining thereon and therein, and shall pursue such work thus begun continuously during the life of this agreement in a workmanlike and minerlike manner.

He shall perform upon the ground before the 1st day of June, 1909, sufficient work to fulfill all the statutory requirements as to annual labor, and shall cause proper affidavit as to said work so performed to be recorded in the office of the Recorder of the District in which the said property is.

He shall, on or before the first day of August, 1909, place upon the said ground, at his own proper cost and expense, one boiler of sufficient horse-power, and necessary machinery to work the ground in an advantageous manner to all concerned.

The said lessee shall sink one hole to bed rock on said claim before the first of June, 1909.

He shall put through the sluice boxes all the pay dirt found; [172]

He shall do only such panning as is necessary to keep the run of the pay; He shall clean up only in the presence of the lessor or his agent; He shall keep securely and at his own risk all the gold and precious metals extracted from the ground, and on the de-

mand of the lessors they shall deliver to them twenty-five per cent. of the gross product in full consideration for all the privileges hereby let, leased and demised, the remainder the lessee shall retain in full compensation for all labor performed under this agreement;

The lessor retains the right to enter, pan and rock upon the said premises at any time for the purpose of determining the character of the ground and the proper conduct of the work;

The rights and privileges hereby let, leased and demised shall not be transferred in whole or in part unless the consent of the lessor is first had and obtained in writing.

At the close of the period hereby granted, or at its sooner termination, in accordance with the terms hereof, all flumes, dams, ditches and cabins constructed on or adjacent to the said premises in connection with this work shall become and remain the absolute property of the lessor without any other notice, deed or transfer;

The lessee hereby agrees that at the expiry or sooner determination of this lease, in accordance with the terms hereof, that they will peaceably yield possession of the said premises, save and except that if, having used due diligence in their work, they shall not have finished sluicing, a reasonable extension shall be given them to complete that work;

Any violation of the terms or conditions herein and hereby agreed to by the lessee shall forfeit rights to all results that may have accrued prior to said violation, and the lessor may enter into possession

as fully and freely as though by the expiry of the term.

IN TESTIMONY WHEREOF, the parties hereto have hereto set [173] their hands and seals the day and year first above written.

JESSE NOBLE. [Seal]

HARRY BUHRO. [Seal]

MARGARET MULROONEY.

By HARRY BUHRO,

Her Attorney in Fact.

CHARLES J. ERICKSON. [Seal]

In the presence of:

H. H. SCALES.

L. M. DRURY.

United States of America,
Territory of Alaska,—ss.

THIS IS TO CERTIFY: That on this 23d day of March, A. D. 1909, before me, the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally came Jesse Noble and Charles J. Erickson to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal, the day and year in this certificate first above written.

[Notarial Seal]

H. H. SCALES,

Notary Public in and for the Territory of Alaska.

United States of America,
Territory of Alaska,—ss.

THIS IS TO CERTIFY that on this, the 25th day or March, A. S. 1909, before me, a Notary Public in and for the District of Alaska, duly commissioned and sworn, personally came Harry Buhro to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that he signed the same for himself and as attorney for Margaret Mulrooney as his free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal, the day and year in this certificate first above written.

[Notarial Seal]

H. H. SCALES,

Notary Public in and for the District of Alaska.

[174]

[Indorsed]: 32,241.

Territory of Alaska,
Fourth Judicial Division,—ss.

Filed for record at request of Charles Joynt on the 10th day of Sept., 1910, at 11 A. M., and recorded in Vol. Five of Leases, page 43, Fairbanks Recording District.

JOHN F. DILLON,

Recorder.

By R. H. Geoghegan,

Deputy.

Defendants' Exhibit No. 3.

KNOW ALL MEN BY THESE PRESENTS,
That Charles J. Erickson, of Cleary Creek, Alaska,

the party of the first part, for and in consideration of the sum of Fifteen hundred dollars legal tender of the United States of America, to him in hand paid by Ed Jern of the same place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns all interest of the said party of the first part in and to that certain lease agreement made on the 23rd day of March 1909 by and between Jesse Noble, Harry Buhro and Margaret Mulrooney, lessors, and Charles J. Erickson, lessee, and covering creek placer mining claim No. 2 above Wolf Creek tributary of Cleary Creek, Fairbanks Recording District, Alaska, and the log cabin thereon;

Also an undivided one-half interest in the water ditch on said Wolf Creek, heading on #3 above and used for the purpose of supplying water to claim #2. [175]

Also the complete plant of mining machinery located on said #2 above, Wolf Creek, consisting of one 12 h. p. boiler, pipes, fittings, tools of all kinds thereon, and all sluice and flume boxes and all the wood belonging to said lease;

Together with all the rights and privileges of any description whatsoever arising under said lease, and subject to all the consitions and agreements therein contained and to all the debts now owing by and on account of said lease.

To have and to hold the same to the said party of the second part, his executors, administrators and

assigns, forever. And I do for my heirs, executors and administrators, covenant and agree to and with the said party of the second part his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part his executors, administrators and assigns against all and every person and persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 2nd day of September in the year of our Lord one thousand nine hundred and ten.

CARL J. ERICKSON. [Seal]

ED JERN. [Seal]

Signed, sealed and delivered in the presence of;

R. M. COURTNEY.

R. J. CARY.

C. BAKER.

United States of America,

Territory of Alaska,—ss.

THIS IS TO CERTIFY: That on this 2nd day of September, A. D. 1910, before me, R. M. Courtney, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came Charles J. Erickson, to me known to be the individual [176] described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Notarial Seal]

R. M. COURTNEY,

Notary Public in and for the Territory of Alaska,
Residing at Chatanika.

[Indorsed]: 32,244. Bill of Sale. Carl J. Erickson to Ed Jern.

United States of America,
Territory of Alaska,—ss.

Filed for record at request of Charles Joynt on the 10 day of Sept 1910 at 30 ~~minutes~~ past 4 P. M. and recorded in volume One of Bills of Sale page 606 and indexed in Deeds (Vol. 14) Records of Fairbanks Precinct, Territory of Alaska.

JOHN F. DILLON,

Recorder.

By R. H. Geoghegan,

Deputy.

Defendants' Exhibit No. 4.

(See page 80 transcript.) [177]

Defendants' Exhibit No. 5.

NOTICE.

To it May Concerne We The Clame oner will not
bee responcapel for eney wages or eney other in
detnes Con trcted by lamen on sed clame By lamen.

L. C. HESS.

BEN BOONE.

By JESSE NOBLE. [178]

[Title of Court and Cause.]

**Proposed Findings of Fact and Conclusions of Law
of Defendants Noble, Boone and Hess.**

This matter having come on regularly for hearing before the above-entitled Court on the 1st and 2d days of April, 1912, Guy B. Erwin, Esq., appeared for the plaintiff, and Arthur Frame, Esq., for the defendants, and the Court having heard the evidence and proofs offered on behalf of the said plaintiff and defendants, respectively, and considered the records and papers in said cause, comes now the above-named defendants Jesse Noble, Ben Boone and Luther C. Hess and move and request the Court to make and enter Findings of Fact and Conclusions of Law as follows, to wit:

I.

That the above-named defendants Luther C. Hess and Ben Boone now are, and at the time of the commencement of this action were, the owners of that certain placer mining claim situate in the Fairbanks Recording District, District of Alaska, Fourth Judicial Division, known and described as creek claim Number 2 Above Discovery on Wolf Creek; that the said claim is a placer mining claim valuable for the gold contained within its boundaries, and that the same has been operated by the lessees of the owners of said claim for a period of more than two years prior to the institution of said action; that on the 23d day of March, 1909, the owners of said property executed to one Charles J. Erickson a lease to work and mine said property, which said

lease the said Erickson did thereafter and on the 2d day of September, 1910, assign and transfer to [179] the above-named defendant Ed Jern, who thereupon took possession of the said property and thereafter and until about the 9th day of June, 1911, was engaged in the operation of the same as a placer mine and in removing and extracting the pay-dirt and gold-dust and other valuable minerals therefrom.

II.

That during the winter of 1910-11 the said Ed Jern, in the course of his mining operations of said property as a placer mine, was engaged in removing and hoisting the pay-dirt therefrom and placing the same upon the surface of the ground in a dump, with the exception of a portion of the months of February and March, during which time the said Jern was engaged in sinking a shaft upon a piece of virgin ground upon said property and running tunnels; that said shaft was sunk to a depth of about forty feet and the tunnel run up and down said claim from the bottom of said shaft a distance of about one hundred feet each side of said shaft, and the dirt taken from said tunnel was placed in the dump which had been removed from said property by said Jern in his operations of the same, and for which said Jern had paid his workmen in full; and that during the months of April and May, 1911, and particularly at the time when the said plaintiff Algot Gustafson and the other lien claimants mentioned in the complaint claim to have performed services in sinking a shaft and running cross-cuts and tunnels upon said prop-

erty, the said Ed Jern was engaged in the work of sluicing the dump which had been theretofore and during the said winter of 1911 hoisted from said claim and placed upon the surface thereof, and also during the latter part of said month of May, 1911, keeping in repair the ditch that had been theretofore and during the falls of 1909 and 1910 constructed for the purpose of conveying water to said property to enable them to sluice up the gold-bearing gravels removed therefrom. [180]

III.

That the said Charles J. Erickson posted upon said property, in a conspicuous place thereon, in about the month of July, 1910, a notice to the effect that the owners of said claim would not be responsible for any debts contracted by laymen on account of labor performed and materials furnished and used on said property, which said notice was placed upon the upper center stake of said property; and that thereafter and about the month of August, 1910, the above-named defendant Jesse Noble posted on the lower center stake of said property a notice to the same effect; that said notices remained so posted until the spring of 1911; and that again, in the month of March, 1911, the said Noble posted on said upper center stake, to replace the said notice that said Erickson had theretofore posted upon said stake, a third notice to the effect that the owners of said property would not be responsible for any debts contracted by lessees on account of labor performed or materials furnished and used upon said claim; each of which said notices was signed by the owners

Luther C. Hess and Ben Boone.

As conclusions of law from the foregoing facts, the Court finds:

CONCLUSIONS OF LAW.

I.

That the work and labor done and performed by the said plaintiff Algot Gustafson and by the other lien claimants Victor Anderson, Thomas Wright, Gust Honk, Carl Strass and Knute Peterson was done and performed upon said claim in the operation and ordinary working of the same as a placer mine; and that the work done thereupon, to wit, sluicing up the dump and repairing the ditch was all incident to the mining operations being carried on on said property, and that for such work [181] and labor the laws of the District of Alaska do not give laborers any lien.

II.

That the said plaintiff is not entitled to the relief sought; and that the said defendants are entitled to a judgment dismissing said cause, and for their costs and disbursements necessarily incurred.

District Judge. [182]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This matter coming on regularly for trial before the above-entitled court on the 1st and 2d days of April, 1912, Guy B. Erwin appearing for the plaintiff, and John L. McGinn and Arthur Frame appear-

ing for the defendants, and the court having heard the evidence and proofs offered on behalf of the said plaintiff and defendants respectively, and considered the records and papers in the cause, and the said cause being submitted to the court for its decision after argument of the said attorneys, and the Court having considered the same, now finds the following facts:

FINDINGS OF FACT.

I.

That between the 1st day of April, 1911, and the 9th day of June, 1911, one Thomas Wright performed sixty-eight days' work and labor upon that certain placer mining creek claim known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska; that said work and labor so performed by the said Thomas Wright upon said mine and premises described was performed by him as cook for workmen and laborers engaged in the development and improvement of said mine and premises in sinking shafts and running tunnels in opening up a block of virgin ground in said mine and in sluicing and washing the gold-bearing gravels excavated and hoisted from said [183] workings, and in repairing and keeping in repair a certain water ditch used to convey water to said premises for sluicing purposes for the development and improvement thereof; that such work and labor was done upon said premises at the request of the defendant Ed Jern, who at said time was in charge of the development and im-

provement of said mine, who promised to pay said Thomas Wright \$5.00 per day and board for each and every day's work so done as aforesaid; that the said Thomas Wright commenced the performance of said work and labor on the 1st day of April, 1911, and ceased said work and labor on the 9th day of June, 1911, and during said period earned the total sum of \$340; that no part of said sum has been paid except the sum of \$150 on account thereof, and that there now remains due and owing for said work and labor the sum of \$190 after deducting all just credits and offsets.

II.

That between the 1st day of May, 1911, and the 26th day of May, 1911, one Victor Anderson performed twenty-one (21) days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek hereinbefore described; that said work and labor was done and performed in the construction, development and improvement of said mine and premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that five (5) days of such work and labor was done in repairing and keeping in repair the water ditch used in connection with said mine and premises for the development and improvement thereof; that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Victor Anderson \$5.00 per day

and board for each and every day's work so done as aforesaid; that said Victor Anderson commenced to work and [184] labor upon said mine and premises under a continuing contract long prior to the said 1st day of May, 1911, and ceased said work and labor on the 26th day of May, 1911, and between said dates last mentioned earned the total sum of \$105.00; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$105.00 after deducting all just credits and offsets.

III.

That between the 16th day of May, 1911, and the 1st day of June, 1911, one Gust Honk performed eight days and nine hours' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek hereinbefore described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that five (5) days of such work and labor was done in repairing and keeping in repair and improving the water ditch used in connection with said mine and premises; that said Gust Honk was foreman in charge of the work on said mine and premises, and that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Gust Honk \$7.00 per day and board for each

and every day's work and labor done and performed as aforesaid; that said Gust Honk commenced to work and labor on said mine and premises under a continuing contract long prior to the said 16th day of May, 1911, and ceased to work thereon on the 1st day of June, 1911, and between said dates last mentioned earned the total sum of \$62.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$62.50 after deducting all just credits and offsets. [185]

IV.

That between the 29th day of April, 1911, and the 3d day of June, 1911, one Knute Peterson performed twenty-nine and one-half days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek above described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that four (4) days of such work and labor was done in repairing and keeping in repair the water ditch used in connection with said mine and premises for the improvement thereof, and said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Knute Peterson \$5.00 per day and board for each and every day's work and labor done and performed by him on said mine as aforesaid; that the said Knute Peterson

commenced to work and labor on said mine and premises on the 29th day of April, 1911, and ceased to labor thereon on the 3d day of June, 1911, and during said period earned the total sum of \$145.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$145.50 after deducting all just credits and offsets.

V.

That between the 16th day of May, 1911, and the 4th day of June, 1911, one Carl Strass performed nineteen (19) days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, above described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run [186] in the development and improvement of said mine, and that seven (7) days of such work and labor was done in repairing and keeping in repair the water ditch used in connection with said work and for the improvement thereof, and was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Carl Strass \$6.00 per day and board for each and every day's work and labor done and performed as aforesaid; that the said Carl Strass commenced to work and labor on said mine and premises on the 16th day of May, 1911, and ceased to labor thereon on the 4th day of June, 1911, and during said period earned the

total sum of \$114.00; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$114.00 after deducting all just credits and offsets.

VI.

That between the 1st day of May, 1911, and the 1st day of June, 1911, the plaintiff Algot Gustafson performed twenty-nine and one-half days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, hereinbefore described; that said work and labor was done in the construction, development and improvement of said mining premises in firing the boiler, thawing dump, and in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and in repairing and keeping in repair the water ditch used in connection with said premises; that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said plaintiff \$5.00 per day and board for each and every day's work and labor done and performed [187] as aforesaid; that said plaintiff commenced to work and labor on said mine and premises under a continuing contract long prior to the said 1st day of May, 1911, and ceased to labor thereon on the 1st day of June, 1911, and between said dates last mentioned earned the total sum of \$147.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$147.50 after deduct-

ing all just credits and offsets.

VII.

That during all the time the plaintiff and the lien claimants Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass were performing work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, aforesaid, the defendants Jesse Noble, Luther C. Hess and Ben Boone were and still are the owners and reputed owners of the said claim above described, and of the whole thereof.

VIII.

That on the 23d day of March, 1909, the then owners of said claim executed a lease in favor of one Charles J. Erickson to work and mine said claim, and that thereafter and on the 2d day of September, 1910, said Erickson transferred his interest in said lease to the defendant Ed Jern, and that thereafter and during all the times the plaintiff and the lien claimants were performing work and labor on said claim the defendant Ed Jern was in possession of said claim as the agent and lessee of the owners and had charge of the improvement and development thereof, and that during all of said time the defendants Jesse Noble, Luther C. Hess and Ben Boone had actual knowledge of the construction, development and improvement of said mine and premises, and of the hiring and employment of the plaintiff Algot Gustafson and the said lien claimants Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass [188] therein, and of the work and labor done and performed by them and each of them as

aforesaid upon said mine and premises in the development thereof and the construction of said improvements thereon; and that said development and improvement upon said mine and premises enhanced and increased the value thereof to the extent of said work done thereon.

IX.

That the defendants Luther C. Hess, Ben Boone and Jesse Noble, after they had knowledge of the development and improvement of said mine and premises, failed to give notice that they would not be responsible for the work and labor done upon said premises by posting and keeping posted a notice in writing to that effect in a conspicuous place upon the said mining claim and premises or upon any building or other improvement situate thereon.

X.

That on the 12th day of June, 1911, and within thirty (30) days after the plaintiff Algot Gustafson, and the said Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass had ceased to work upon said mine and premises, for the purpose of perfecting and securing a lien upon said mine and premises under the provisions of Chapter 28, Title III of the Alaska Code of Civil Procedure, each of the said claimants Algot Gustafson, Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass caused to be prepared and filed for record in the office of the recorder in and for the Fairbanks Recording District, Territory of Alaska, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his

respective demand, after deducting all just credits and offsets, with the name of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien [189] sufficient for identification, which claims of lien were each duly verified by the oath of the respective claimants, and the same were thereafter duly recorded in the records of said Fairbanks Recording District.

XI.

That said Algot Gustafson, Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass each paid the sum of \$3.70 for filing and recording his respective notice and claim of lien, in all the sum of \$22.20.

XII.

That the sum of \$50.00 is a reasonable sum to be allowed plaintiff as an attorney's fee for the preparation of notice of claim of lien and foreclosure of the lien of each claimant in this suit, making in all the sum of \$300.00.

XIII.

That after the filing of said notices of claim of lien, and prior to the commencement of this action, the claimants Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass, on the 15th day of June, 1911, by assignment in writing, duly assigned and transferred their respective liens, and all the indebtedness secured thereby, and all sums due or to become due thereupon, to the plaintiff

Algot Gustafson, and said plaintiff is and ever since said time has been the owner and holder thereof.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts, the Court finds:

I.

That the said liens of claimants Algot Gustafson, Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass, and each of them, were and are valid and subsisting liens for the amounts therein claimed, against the estate of [190] the said defendants Luther C. Hess, Ben Boone and Jesse Noble in the mine and premises therein described.

II.

That the said liens and each and all of them may be foreclosed in the manner provided by law, and the estate of the said defendants Luther C. Hess, Ben Boone and Jesse Noble in said premises sold to satisfy the said liens and each of them, together with \$22.20 filing fees, \$300.00 attorney's fees, and interest and costs, and that decree may issue in accordance herewith.

Done in open Court at Fairbanks, Alaska, this 6th day of April, 1912.

PETER D. OVERFIELD,
District Judge. [191]

[Title of Court and Cause.]

**Exceptions of Defendants Jesse Noble, Ben Boone
and Luther C. Hess.**

The defendants Jesse Noble, Ben Boone and Luther C. Hess, object and except to the Findings of Fact and Conclusions of Law made and adopted by the Court and filed in said cause on the 6th day of April, 1912, upon the following grounds, to wit:

I.

Object and except to the findings of fact in paragraph 1 of said Findings of Fact for the reason that the same is contrary to the evidence in said cause in that the evidence does not show that any laborers upon said claim Number Two Above Discovery on Wolf Creek were engaged between the 1st day of April, 1911, and the 9th day of June, 1911, in sinking shafts or in running tunnels in opening up a block of virgin ground on said claim; and that said findings are without the issues raised by the pleadings in said cause in that no claim for lien is made for services rendered in washing and sluicing up gold-bearing gravels or in repairing any ditch.

II.

Object and except to the findings of fact contained in paragraph 2 of said Findings, for the reason that the said findings are without the issues raised by the pleadings in said cause, in that there is no claim of lien for any work done by said Victor Anderson in washing and sluicing up a dump of gold-bearing gravels, or for work done and performed upon any ditch; [192] and that there is no evidence of any

continuing contract.

III.

Object and except to the findings of fact in paragraph 3 of said Findings, for the reason that the said findings are without the issues raised by the pleadings in said cause, in that there is no claim of lien for any work done by said Gust Honk in washing and sluicing up the dump of gold-bearing gravels or for any work done and performed upon any ditch; and that there is no evidence of any continuing contract.

IV.

Object and except to the findings of fact contained in paragraph 4 of said Findings, for the reason that the said findings are without the issues raised by the pleadings in said cause, in that there is no claim of lien for any work done by said Knute Peterson in washing and sluicing up the dump of gold-bearing gravels or for any work done and performed upon any ditch; and that there is no evidence of any continuing contract.

V.

Object and except to the findings of fact in paragraph 5 of said Findings, for the reason that the said findings are without the issues raised by the pleadings in said cause; that there is no claim of lien for any work done by said Carl Strass in washing and sluicing up the dump of gold-bearing gravels or for any work done and performed upon any ditch; and that there is no evidence of any continuing contract.

VI.

Object and except to the findings of fact in para-

graph 6 of said Findings, for the reason that the said findings are without the issues raised by the pleadings in said cause; that there is no claim of lien for any work done by said Algot Gustafson in washing and sluicing up the dump of gold-bearing gravels or for any work done and performed upon any ditch; and that there is no evidence of any continuing contract. [193]

VII.

Object and except to the findings of fact contained in paragraph 8 of said Findings, for the reason that the same is immaterial, and particularly for the reason that there is no evidence to sustain the finding that the development and improvement upon said mine and premises increases the value thereof to the extent of the work done thereon.

VIII.

Object and except to the findings of fact contained in paragraph 9 of said Findings, for the reason that the said finding is contrary to the evidence in said cause.

IX.

Object and except to the findings of fact contained in paragraph 10 of said Findings, for the reason that no competent evidence of any kind was adduced by the said plaintiff to sustain said findings.

X.

Object and except to paragraph 1 of the Conclusions of Law for the reason that the same is contrary to law, and is without any of the issues raised by the pleadings in said cause.

XI.

Object and except to the conclusions of law contained in paragraph 2 of said Conclusions of Law, for the reason that the same is contrary to law, and is without any of the issues raised by the pleadings in said cause.

And now, in furtherance of justice and that right may be done, the defendants Jesse Noble, Ben Boone and Luther C. Hess present the foregoing bill of exceptions in said cause and pray that the same may be settled and allowed and signed and certified by the Judge of this court in the manner prescribed by law.

JOHN L. MCGINN and
ARTHUR FRAME,

Attorneys for Said Defendants. [194]

Service of a true copy of the foregoing Bill of Exceptions is hereby acknowledged this 25th day of April, 1912, at Fairbanks, Alaska.

G. B. ERWIN,
Attorney for Plaintiff. [195]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

BE IT REMEMBERED that upon the 25th day of April, 1912, the above-named defendants Ben Boone, Jesse Noble and Luther C. Hess presented the foregoing Bill of Exceptions for settlement, which said proposed bill of exceptions was served and filed within the time allowed by law and the rules of this court, which said bill of exceptions consists of the foregoing typewritten pages of the proceedings

and the testimony of the witnesses given on behalf of the plaintiff and the defendants, as well as the exhibits and documentary evidence introduced upon said trial, and constitutes a full and true report of all the proceedings had upon the trial of said cause, and of the objections and exceptions made and taken during said trial, and of the rulings of the Court thereon.

And it appearing to the Court, upon examination of said bill of exceptions, that the same contains all the evidence, testimony and exhibits introduced and given upon the trial of said cause, as well as the proceedings therein not of record, and is in all respects true and correct.

Now, therefore, on motion, it is hereby,

ORDERED that the foregoing typewritten pages be, and the same is hereby approved, allowed and settled as the bill of exceptions in the above-entitled cause, and made a part of the record herein. [196]

IT IS FURTHER ORDERED AND ADJUDGED: That the foregoing bill of exceptions constitutes all of the evidence, testimony, exhibits and proceedings had in the above-entitled cause not appearing on record, and that the same is in all respects full, true and correct, and has been filed and presented within the time allowed by the orders and rules of this court.

Done at Fairbanks, Alaska, this 2d day of May, 1912.

PETER D. OVERFIELD,

District Judge.

Entered in Court Journal No. 11, page 870.

[Endorsed]: No. 1664. District Court, Fourth Judicial Division, Territory of Alaska. Algot Gustafson vs. Jesse Noble et al. Bill of Exceptions. Received Clerk of the Court Office Apr. 26, 1912. Fairbanks, Alaska, C. C. Page, Clerk. By H. C. Green, Deputy. Filed in the District Court, Territory of Alaska, 4th Div. May 2, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [197]

[Title of Court and Cause.]

Oral Opinion.

The evidence in this case shows that the lienors began work in most instances before the sluicing season began; the cook, however, began on April 1st, and one of the others began along about the time they were cleaning up; but other than that there is no doubt in my mind that there was a continuing contract on their part with the lessee Jern to labor for him at their stated wages, and the fact that they happened to be paid (probably at the first cleanup) certain amounts of money by check is no indication to the Court that their services were then terminated and a new contract entered into for the remainder of the season; in fact, the evidence is just the contrary as I view it. And, while I think the complaint and notices of lien should set out the contract of employment as beginning from the time that the evidence now shows it did, and when it terminated, rather than as has been done in this case, I do not believe there is such variance under the circumstances as to prevent the lienors from recovering; and it is so held.

Such being the case, that they had continuing contracts, does the fact change, as contended for by attorney for defendants, because they were paid on May 1st, when thereafter they sluiced up the dump, a part of which was taken from running drifts one hundred feet each side of the shaft admittedly put down upon virgin ground, and placed in a dump taken from a block of ground that was blocked out and mined and put on top of the ground before this shaft was sunk and the tunnels run? [198]

In my opinion there is no question that the development and improvements mentioned under the section of our Code in reference to the maintenance of liens consists of blocking out as we do on the creeks around about Fairbanks, sinking your shaft, running your tunnels, putting that ground upon the surface and sluicing it up. It is just as much a part of the development of the claim to sluice up that gravel that contains pay after it is put upon the surface as it is to put a thaw in to sink that shaft or run those tunnels. There is no question in my mind, therefore, that these men were entitled to their liens for the sluicing up of that part of the gravel that came from the shaft and the tunnels, as they would be for the number of days they were employed in sinking the shaft and running the tunnels.

Now, the next question would be: Ought there to be a segregation? Ought there to be no lien for these employees for the time they were sluicing up the dump from the block of ground that was mined previous to this last-mentioned work? The answer that I have already made in a way answers that. While

there might be some exceptions, yet, under the circumstance of this case where a block or portion of the claim has been mined out by putting down a shaft and running tunnels, developing it, showing that it was a paystreak, and putting that upon the surface; then opening up a block of ground next to it by putting down a shaft and running tunnels 100 feet each way, blocking out, as we say, two hundred feet of ground, and putting the gravel from that

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indiscriminately with the other dump into one mass or dumps

shaft and those tunnels upon the surface;

and washing up that dump in my opinion entitles these men to their pay and lien just as much in one instance as in the other; and I shall so hold.

I have no doubt, also, that the labor performed upon and about that ditch in providing water to sluice up that dump was just as important work as any other in connection with the [199] mining and developing of the ground.

It cannot be said that taking the gold from a claim in Alaska is not a development of the mine; otherwise, of course, the lien would never attach and you would have no development of mines in Alaska unless you are going to make a distinction and allow a lien for opening up a claim, and then discharge those men and have other men come and and mine the ground

work and say they cannot have a lien. If men keep on working, after putting down a shaft, running tunnels, and putting the dirt out on top, they are entitled to a lien under the laws as they are in Alaska.

That brings us down to the point of whether the one lienor has a lien for the time he worked, beginning—we will say—in May, after admittedly the work was all done except the sluicing up of the dump and attending to the ditch. He admittedly had nothing to do with the mining of the ground. Now, suppose ten men had mined all winter and opened up the ground by putting down a shaft, running tunnels 100 feet each way, and putting the gravel upon the surface, and they for some reason are discharged or leave, and this man is then hired to sluice up that dump and take care of the ditch while sluicing up the dump. Is he entitled under ^{NP} PDO our Code to a lien upon the ground for his wages in the event he is not paid by the lessee, and the owners of the ground have not posted, according to law, the notices of nonliability? On that point I have expressed some doubt, and I was willing for the attorneys (if they could) to show some law to the Court the fact that that was not done, and in view of the slightness of upon that subject. But, in view of the doubt ^Λ in my mind, and for the reason that such a condition of affairs should not be allowed to exist, I am going to allow that lien; otherwise a man might very easily (if he desired to prevent liens of laborers here) discharge the men who had carried on the mining all winter, hire new men at the cleanup to wash up the dump (and the cleanup, if the water was not [200] plentiful during a dry season, might extend over a considerable part of the summer) and, if someone got away with the gold-dust, these men

would have absolutely no redress or protection. I do not believe that was contemplated by the lien law, and I believe that the remedial part of the lien law protects the men to that extent.

That brings us to the question of whether these lienors are entitled to any compensation or lien under the statute by reason of the fact, as alleged by defendants, that they posted and kept posted notices in conspicuous places on the claim No. 2 Above on Wolf Creek during the time these liens are claimed to have attached, to wit, during the time these laborers were working out there. Here we get into the domain of evidence, a question of fact which is to be decided by the Court. It is unquestionably true that if the owners, defendants in this case, posted notices in conspicuous places upon the claim and kept them posted, that these lienors would have no liens. I have been interested to find out from the evidence whether there
in and about Fairbanks

is any custom here with reference to where notices,
such as required by the statute to limit the liability of the owners, would be posted, but I have not found to my satisfaction that there is any such custom.

What has been said by one of the defendants appeals to the Court as the proper rule (and it is probably proper that I should at this time call it to the notice of laborers and claim owners in this district), and that is, that these notices of nonliability should be posted some place on the claim where the men would be most likely to see them.

I can understand that if a custom had grown up here to post such notices on the end center stakes of a claim, that it might be a sufficient posting, for if the men generally knew that they were posted there, they would go there and look for them, and in such case I am not prepared to say that that would [201] not be sufficient, and I would hold it so in this case, unless I should find, as judge of this court, that there ought to be notices posted in other places than that. But there has been no custom shown in this case, and there is no evidence that a notice was posted in any place other than on the upper and lower end center stakes of this claim. Now, in my opinion, there ought to be more of a posting than that even on a 20 acre claim. Patently, ordinarily such a posting upon a 160 acre claim would not be sufficient notice. It might turn out in some particular case that it would be, because the work on a 160 acre claim might be close to one end of the claim, so that if the notice were posted on one of the end center posts it might be right close to where the work was being carried on. But I cannot see that any hardship would be imposed upon claim owners here if they were required to put up a stake with a board on it, as we do with notices of application for patent. It would not cost much to have a little piece of glass put over it, as we do in those cases. A board say 10 by 12 inches on a post 4 or 5 feet high would answer the purpose ordinarily, even though there might be several laymen upon a claim, as there was in this case. There must have been some advantageous position for such a post upon that claim, where it would have given sufficient notice

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to the men working upon ~~either~~ of those three lays.

Another posting that appeals to me, as suggested by one of the defendants in this case, would be a notice posted upon the bunkhouse or boiler-house. In this case the bunkhouse being on a side that is off the claim on which the labor was being performed

claim is sufficient reason for not making a

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^Aposting on that particular bunkhouse. But ordinarily in this country in the wintertime the boiler-house is used by the employees and a posting on it would surely be in one of the conspicuous places.

In the summer-time, of course, a different rule would obtain, and a posting on the bunkhouse (if it were on the claim) would be in a conspicuous place. But, for both [202] summer and winter, it would seem to me that the plan suggested of having a post driven in the ground, or in the winter (if it cannot be driven into the ground handily) braced up, with a near the mouth of the shaft or shafts, or open cut, board on it and on the face of the board the notice

^A(which could be protected under the law from being destroyed by workmen or others, if they desired to do so) would seem to me to be an easy method of keeping them posted, and would not work any hardship.

Passing then to the evidence in this case

on the end stakes

as to the posting there is some doubt in my

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^Amind. There is positive testimony on the part of at least three witnesses that postings

were made at certain times upon these two stakes; and there is positive testimony on the part of the men whom you would think would be interested and who were naturally interested to see notices, and they have seen none, although they have been in a position with reference to the notice posted upon this upper stake to see it day after day especially in May.

Under the rules of evidence, in my opinion there is not evidence sufficient to convince the Court that this posting was made and maintained upon this claim in such a conspicuous place as to relieve the defendants from liability, and judgment may be entered against them for the amount of the claims as set out in the complaint; the attorneys' fees for the lien claimants as set out in the complaint, being \$50 for each lien, six in number, amounting in all to \$300, will be allowed.

Findings of fact and conclusions of law may be prepared, and a decree entered accordingly, and the costs of filing the liens, to wit, \$3.70 each, will also be allowed.

PETER D. OVERFIELD,

Judge.

Transcribed and signed this 4th day of May, 1912.

[Endorsements]: No. 1664. District Court, 4th Division, Territory of Alaska, Algot Gustafson vs. Jesse Noble et al. Opinion. Filed in the District Court, Territory of Alaska, 4th Div., May 4, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [203]

[Title of Court and Cause.]

Decree.

This cause having come on regularly for trial on the 1st and 2d days of April, 1912, in open court, in the presence of the respective parties, Guy B. Erwin appearing as attorney for plaintiff, and John L. McGinn and Arthur Frame appearing as attorneys for defendants, and the Court having heard and considered the evidence and proofs offered on behalf of the respective parties, and the arguments of said attorneys, and having considered the same, and the Court having heretofore made and signed its findings of fact and conclusions of law herein, and being advised in the premises, now therefore, on motion of said attorney for the plaintiff,

IT IS HEREBY ADJUDGED AND DECREED THAT the liens of claimants Thomas Wright for \$190.00, Victor Anderson for \$105.00, Gust Honk for \$62.50, Knute Peterson for \$145.50, Carl Strass for \$114.00 and Algot Gustafson for \$147.50, amounting in all to \$764.50, and now held and owned by said plaintiff Algot Gustafson, are and have been since the 12th day of June, 1911, each and all valid and subsisting liens upon and against the estate of defendants Luther C. Hess, Ben Boone and Jesse Noble, the owners and reputed owners of said premises, in and to that certain mine and premises known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District,

Territory of Alaska, together with the appurtenances.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said premises described may be sold in the manner prescribed by law [204] to satisfy the said liens, interest, costs and expenses, and that from and out of the proceeds of such sale the plaintiff be paid in the first place the costs and expenses of and incidental to the sale, and the said sum of \$764.50, the total amount of said liens, together with interest thereon from the 12th day of June, 1911, at the rate of eight per cent (8%) per annum amounting to \$49.95, and also together with the sum of \$22.20 paid for filing and recording said liens, and the sum of \$300.00 attorney's fees herein, making together the total sum of \$1136.65, together with taxed costs herein, \$200.55, and accruing costs.

AND IT IS FURTHER ORDERED that execution may issue hereon.

Done in open court this 6th day of April, 1912.

PETER D. OVERFIELD,

District Judge.

Entered in Court Journal No. 11, page 816.

[Endorsements]: No. 1664. District Court, Territory of Alaska, 4th Division. Algot Gustafson vs. Jesse Noble et al. Decree. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 6, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. Guy B. Erwin, Attorney for Plaintiff. [205]

[Title of Court and Cause.]

Assignment of Errors.

Come now the above-named defendants Jesse Noble, Ben Boone and Luther C. Hess, and file the following assignment of errors upon which they will rely upon their appeal from the judgment made by this Honorable Court upon the 6th day of April, 1912, in the above-entitled cause:

I.

The Court erred in admitting in evidence plaintiff's exhibits "G," "H," "I," "J," "K," and "L," over the objection of said defendants, for the reasons: First, that each of said claims of lien was incompetent; second, that the items of work for which each of said liens was claimed are not lienable under our statute, and that it is for different work, labor and services than that shown by the testimony to have been performed by said plaintiff and lien claimants.

II.

The Court erred in overruling the motion of said defendants, made at the conclusion of plaintiff's case, to dismiss said action and for judgment of dismissal in favor of said defendants, for the reasons specified in said motion, to wit: First, that the evidence introduced by the plaintiff did not sustain any of the allegations of the complaint; second, that all of the testimony shows that the work and labor which had been done on said ground had been done in the operation of the property as a placer mine, and was not work or services for which the [206] statute gives a lien.

III.

The Court erred in denying defendants' motion, made at the conclusion of the trial of said cause, for judgment in favor of said defendants, upon the grounds specified in said motion, to wit: That there was a total variance between the allegations of the complaint and the testimony that had been introduced by the plaintiff; that the statute does not give a lien for any of the work proven to have been performed during the time for which the liens are claimed; that there was a total lack of evidence to support a judgment against the defendants Luther C. Hess, Ben Boone and Jesse Noble; that there was a total lack of evidence to support a judgment of foreclosure of the liens; and that the testimony which had been introduced by the defendants showed that notices of nonliability had been kept posted upon the ground, and that, even if such notices were not so kept posted, the work and labor which the plaintiff and the lien claimants performed was performed in the operation of the property as a placer mine in extracting the gold-dust and gold-bearing gravels therefrom, for which work it is not the theory of the law that notices of nonresponsibility shall be given.

IV.

The Court erred in refusing to make and adopt the finding of fact requested by the defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 1 of the proposed findings of fact of said defendants, to wit:

“That the above-named defendants Luther C. Hess and Ben Boone now are, and at the time

of the commencement of this action were, the owners of that certain placer mining claim situate in the Fairbanks Recording District, District of Alaska, Fourth Judicial Division, known and described as creek claim Number 2 Above Discovery on Wolf Creek; that the said claim is [207] a placer mining claim valuable for the gold contained within its boundaries, and that the same has been operated by the lessees of the owners of said claim for a period of more than two years prior to the institution of said action; that on the 23d day of March, 1909, the owners of said property executed to one Charles J. Erickson a lease to work and mine said property, which said lease the said Erickson did thereafter and on the 2d day of September, 1910, assign and transfer to the above-named defendant Ed Jern, who thereupon took possession of the said property and thereafter and until about the 9th day of June, 1911, was engaged in the operation of the same as a placer mine and in removing and extracting the pay-dirt and gold-dust and other valuable minerals therefrom."

V.

The Court erred in refusing to make and adopt the finding of fact requested by the defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 2 of the proposed findings of fact of said defendants, to wit:

"That during the winter of 1910-11 the said Ed Jern, in the course of his mining operations of said property as a placer mine, was engaged

in removing and hoisting the pay-dirt therefrom and placing the same upon the surface of the ground in a dump, with the exception of a portion of the months of February and March during which time the said Jern was engaged in sinking a shaft upon a piece of virgin ground upon said property and running tunnels; that said shaft was sunk to a depth of about forty feet and the tunnel run up and down said claim from the bottom of said shaft a distance of about one hundred feet each side of said shaft, and the dirt taken from said tunnel was placed in the dump which had been removed from said property by said Jern in his operations of the same and for which said Jern had paid his workmen in full; and that [203] during the months of April and May, 1911, and particularly at the time when the said plaintiff Algot Gustafson and the other lien claimants mentioned in the complaint claim to have performed services in sinking a shaft and running cross-cuts and tunnels upon said property, the said Ed Jern was engaged in the work of sluicing the dump which had been theretofore and during the said winter of 1911 hoisted from said claim and placed upon the surface thereof, and also during the latter part of said month of May, 1911, keeping in repair the ditch that had been theretofore and during the falls of 1909 and 1910 constructed for the purpose of conveying water to said property to enable them to sluice up the gold-bearing gravels removed therefrom."

VI.

The Court erred in refusing to make and adopt the finding of fact requested by defendants Jesse Noble, Luther C. Hess and Ben Boone, contained in paragraph 3 of the proposed findings of fact of the said defendants, to wit:

“That the said Charles J. Erickson posted upon said property in a conspicuous place thereon, in about the month of July, 1910, a notice to the effect that the owners of said claim would not be responsible for any debts contracted by laymen on account of labor performed and materials furnished and used on said property, which said notice was placed upon the upper center stake of said property; and that thereafter and about the month of August, 1910, the above-named defendant Jesse Noble posted on the lower center stake of said property a notice to the same effect; that said notices remained so posted until the spring of 1911; and that again, in the month of March, 1911, the said Noble posted on said upper center stake, to replace the said notice that said Erickson had theretofore posted upon said stake, a third notice to the effect that the [209] owners of said property would not be responsible for any debts contracted by lessees on account of labor performed or materials furnished and used upon said claim; each of which said notices was signed by the owners Luther C. Hess and Ben Boone.”

VII.

The Court erred in refusing to make and adopt the

conclusion of law requested by defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 1 of the proposed conclusions of law of the said defendants, to wit:

“That the work and labor done and performed by the said plaintiff Algot Gustafson and by the other lien claimants Victor Anderson, Thomas Wright, Gust Honk, Carl Strass and Knute Peterson was done and performed upon said claim in the operation and ordinary working of the same as a placer mine; and that the work done thereupon, to wit, sluicing up the dump and repairing the ditch was all incident to the mining operations being carried on on said property, and that for such work and labor the laws of the District of Alaska do not give laborers any lien.”

VIII.

The Court erred in refusing to make and adopt the conclusion of law requested by defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 2 of the conclusions of law requested by said defendants, to wit:

“That the said plaintiff is not entitled to the relief sought; and that the said defendants are entitled to a judgment dismissing said cause, and for their costs and disbursements necessarily incurred.” [210]

IX.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 1 of the Findings of Fact filed herein on April 6th, 1912,

which is as follows, to wit:

“That between the 1st day of April, 1911, and the 9th day of June, 1911, one Thomas Wright performed sixty-eight days’ work and labor upon that certain placer mining creek claim known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska; that said work and labor so performed by the said Thomas Wright upon said mine and premises described was performed by him as cook for workmen and laborers engaged in the development and improvement of said mine and premises in sinking shaft and running tunnels in opening up a block of virgin ground in said mine and in sluicing and washing the gold-bearing gravels excavated and hoisted from said workings, and in repairing and keeping in repair a certain water ditch used to convey water to said premises for sluicing purposes, for the development and improvement thereof; that such work and labor was done upon said premises at the request of the defendant Ed Jern, who at said time was in charge of the development and improvement of said mine, who promised to pay said Thomas Wright \$5.00 per day and board for each and every day’s work so done as aforesaid; that the said Thomas Wright commenced the performance of said work and labor on the 1st day of April, 1911, and ceased said work and labor on the 9th day of June, 1911, and during

said period earned the total sum of \$340; that no part of said sum has been paid except the sum of \$150 on account thereof, and that there now remains due and owing for said work and labor the sum of \$190 after deducting all just credits and offsets.” [211]

X.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 2 of the Findings of Fact filed herein on April 6th, 1912, which is as follows, to wit:

“That between the 1st day of May, 1911, and the 26th day of May, 1911, one Victor Anderson performed twenty-one (21) days’ work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek hereinbefore described; that said work and labor was done and performed in the construction, development and improvement of said mine and premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that five (5) days of such work and labor was done and performed in repairing and keeping in repair the water ditch used in connection with said mine and premises for the development and improvement thereof; that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Victor Anderson

\$5.00 per day and board for each and every day's work so done as aforesaid; that the said Victor Anderson commenced to work and labor upon said mine and premises under a continuing contract long prior to the said 1st day of May, 1911, and ceased said work and labor on the 26th day of May, 1911, and between said dates last mentioned earned the total sum of \$105.00; that no part of said sum has been paid and there now remains due and owing for said work and labor the sum of \$105 after deducting all just credits and offsets." [212]

XI.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 3 of the Findings of Fact filed herein on April 6th, 1912, which is as follows, to wit:

"That between the 16th day of May, 1911, and the 1st day of June, 1911, one Gust Honk performed eight days and nine hours' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek hereinbefore described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft and tunnels run in the development and improvement of said mine, and that five (5) days of such work and labor was done in repairing and keeping in repair and improving the water ditch used in connection with said mine and premises; that said Gust Honk

was foreman in charge of the work on said mine and premises, and that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Gust Honk \$7.00 per day and board for each and every day's work and labor done and performed as aforesaid; that said Gust Honk commenced to work and labor on said mine and premises under a continuing contract long prior to the said 16th day of May, 1911, and ceased to labor thereon on the 1st day of June, 1911, and between said dates last mentioned earned the total sum of \$62.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$62.50 after deducting all just credits and offsets." [213]

XII.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 4 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That between the 29th day of April, 1911, and the 3d day of June, 1911, one Knute Peterson performed twenty-nine and one-half days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek above described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels

extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that four (4) days of such work and labor was done in repairing and keeping in repair the water ditch used in connection with said mine and premises for the improvement thereof, and said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Knute Peterson \$5.00 per day and board for each and every day's work and labor done and performed by him on said mine as aforesaid; that the said Knute Peterson commenced to work and labor on said mine and premises on the 29th day of April, 1911, and ceased to labor thereon on the 3d day of June, 1911, and during said period earned the total sum of \$145.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$145.50 after deducting all just credits and offsets." [214]

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 5 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That between the 16th day of May, 1911, and the 4th day of June, 1911, one Carl Strass performed nineteen (19) days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, above described; that said work and labor was done in

the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that seven (7) days of such work and labor was done in repairing and keeping in repair the water ditch used in connection with said work and for the improvement thereof, and was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Carl Strass \$6.00 per day and board for each and every day's work and labor done and performed as aforesaid; that the said Carl Strass commenced to work and labor on said mine and premises on the 16th day of May, 1911, and ceased to labor thereon on the 4th day of June, 1911, and during said period earned the total sum of \$114.00; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$114.00 after deducting all just credits and offsets."

XIII.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 6 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That between the 1st day of May, 1911, and the 1st day of [215] June, 1911, the plaintiff

Algot Gustafson performed twenty-nine and one-half days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, hereinbefore described; that said work and labor was done in the construction, development and improvement of said mining premises in firing the boiler, thawing dump, and in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine and in repairing and keeping in repair the water ditch used in connection with said premises; that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said plaintiff \$5.00 per day and board for each and every day's work and labor done and performed as aforesaid; that said plaintiff commenced to work and labor on said mine and premises under a continuing contract long prior to the said 1st day of May, 1911, and ceased to labor thereon on the 1st day of June, 1911, and between said dates last mentioned earned the total sum of \$147.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$147.50 after deducting all just credits and offsets."

XIV.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 8 of the

Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

“That on the 23d day of March, 1909, the then owners of said claim executed a lease in favor of one Charles J. Erickson to work and mine said claim, and that thereafter and on the [216] 2d day of September, 1910, said Erickson transferred his interest in said lease to the defendant Ed Jern, and that thereafter and during all the times the plaintiff and the lien claimants were performing work and labor on said claim, the defendant Ed Jern was in possession of said claim as the agent and lessee of the owners and had charge of the improvement and development thereof, and that during all of said time the defendants Jesse Noble, Luther C. Hess and Ben Boone had actual knowledge of the construction, development and improvement of said mine and premises, and of the hiring and employment of the plaintiff Algot Gustafson and the said lien claimants Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass therein, and of the work and labor done and performed by them and each of them as aforesaid upon said mine and premises in the development thereof and the construction of said improvements thereon; and that said development and improvements upon said mine and premises enhanced and increased the value thereof to the extent of said work done thereon.”

XV.

The Court erred in making and filing in said cause

the finding of fact set forth in paragraph 9 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

“That the defendants Luther C. Hess, Ben Boone and Jesse Noble, after they had knowledge of the development and improvement of said mine and premises, failed to give notice that they would not be responsible for the work and labor done upon said premises by posting and keeping posted a notice in writing to that effect in a conspicuous place upon the said mining claim and premises or upon any building or other improvement situate thereon.” [217]

XVI.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 10 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

“That on the 12th day of June, 1911, and within thirty (30) days after the plaintiff Algot Gustafson and the said Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass had ceased to work upon said mine and premises, for the purpose of perfecting and securing a lien upon said mine and premises under the provisions of Chapter 28, Title III of the Alaska Code of Civil Procedure, each of the said claimants Algot Gustafson, Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass caused to be prepared and filed for record in the office of the recorder in and for the Fairbanks Recording District,

Territory of Alaska, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his respective demand, after deducting all just credits and offsets, with the name of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification, which claims of lien were each duly verified by the oath of the respective claimants and the same were thereafter duly recorded in the records of said Fairbanks Recording District."

XVII.

The Court erred in making and filing in said cause the conclusion of law set forth in paragraph 1 of the Conclusions of Law filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That the said liens of claimants Algot Gustafson, Thomas [218] Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass, and each of them, were and are valid and subsisting liens for the amounts therein claimed, against the estate of the said defendants Luther C. Hess, Ben Boone and Jesse Noble in the mine and premises therein described."

XVIII.

The Court erred in making and filing in said cause the conclusion of law set forth in paragraph 2 of the Conclusions of Law filed herein on the 6th day of April, 1912, which is as follows, to wit:

“That the said liens and each and all of them may be foreclosed in the manner provided by law, and the estate of the said defendants Luther C. Hess, Ben Boone and Jesse Noble in said premises sold to satisfy the said liens and each of them, together with \$22.20 filing fees, \$300 attorney’s fees, and interest and costs, and that decree may issue in accordance herewith.”

XVIX.

The Court erred in rendering and entering judgment of foreclosure.

WHEREFORE said defendants pray that the judgment made and entered herein be reversed and for such other relief as in accordance with law they are entitled.

Dated Fairbanks, Alaska, April 26, 1912.

JOHN L. MCGINN and
ARTHUR FRAME,

Attorneys for Defendants Luther C. Hess, Ben Boone and Jesse Noble.

Service of a copy of the foregoing assignment of errors admitted this 26th day of April, 1912.

G. B. ERWIN,
Attorney for Plaintiff.

[Endorsed]: No. 1664. In the District Court for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Assignment of Errors. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 27, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. McGinn & Arthur Frame, Attorneys for Defts. Hess, Boone & Noble, Fairbanks, Alaska. [219]

[Title of Court and Cause.]

Petition to Appeal.

The above-named defendants Jesse Noble, Ben Boone and Luther C. Hess, conceiving themselves aggrieved by the order and judgment made and entered in the above-entitled court and cause on the 6th day of April, 1912, wherein it was ordered, adjudged and decreed that the said plaintiff Algot Gustafson was the owner of certain claims of lien amounting in the aggregate to the sum of \$764.50, which said liens are now and have been since the 12th day of June, 1911, each and all valid and subsisting liens upon and against the estate of defendants Luther C. Hess, Ben Boone and Jesse Noble, the owners and reputed owners of a certain placer mining claim, known as creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, in the Fairbanks Recording District, District of Alaska, together with the appurtenances; and further ordering, adjudging and decreeing that said premises described be sold in the manner prescribed by law to satisfy the said liens, with interest, costs and expenses, amounting in the aggregate to the sum of One Thousand One Hundred Thirty-six and 65/100 (\$1136.65) Dollars, besides costs to be taxed.

Do hereby appeal from said judgment made and entered on said 6th day of April, 1912, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herein, and they pray that this [220] appeal may be allowed, and the transcript of the rec-

ords, papers and proceedings upon which such judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and they pray that the court fix the amount of the appeal bond; that an order be made fixing the amount of security which defendants shall give and furnish upon such appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the United States Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

JOHN L. McGINN and
ARTHUR FRAME,

Attorneys for Defendants Jesse Noble, Ben Boone
and Luther C. Hess.

Due and legal service of the within instrument is hereby admitted this 26th day of April, 1912.

G. B. ERWIN,
Attorney for Plaintiff.

United States of America,
District of Alaska,—ss.

I ————— being first duly sworn on oath, depose and say: That I am the ————— named in the annexed ————— in the above-entitled action; that I have heard the said ————— read and know the contents thereof, and believe the same to be true.

_____.

Subscribed and sworn to before me, the ——— day
of —————, 190 .

_____,

Notary Public in and for the District of Alaska.

Service of a copy of the foregoing ——— admitted this — day of ———, 190 .

_____,
Attorney for ———.

[Endorsements]: No. 1664. In the District Court for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Petition to Appeal. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 27, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. McGinn & Sullivan, Attorneys for ———, Fairbanks, Alaska. [221]

[Title of Court and Cause.]

Order Allowing Appeal.

On motion of John L. McGinn and Arthur Frame, attorneys for the defendants Luther C. Hess, Ben Boone and Jesse Noble,

IT IS ORDERED: That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, filed and entered herein, be and the same is hereby made, and that a certified transcript of the record, testimony, exhibits, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

IT IS FURTHER ORDERED: That a bond on appeal be fixed at the sum of Five Hundred (\$500) Dollars, and the same to act as a supersedeas bond and also for a bond for costs and damages on appeal.

PETER D. OVERFIELD,

' District Judge.

Done at Fairbanks, Alaska, this 27th day of April, 1912.

Due and legal service of a copy of the within instrument is hereby admitted this 27th day of April, 1912.

G. B. ERWIN,

Attorney for Plaintiff.

Entered in Court Journal No. 11, page 857.

[Endorsements]: No. 1664. In the District Court, for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Order Allowing Appeal. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 27, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. McGinn & Sullivan, Attorneys for _____, Fairbanks, Alaska. [222]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Jesse Noble, Ben Boone and Luther C. Hess, as principals, and Peter Vidovich, as sureties, are held and firmly bound unto Algot Gustafson in the full and just sum of Five Hundred (\$500) Dollars to be paid to the said Algot Gustafson, his attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 26th day of April, 1912.

WHEREAS, lately, at a term of the District Court for the District of Alaska, Fourth Judicial Division, in a suit pending in said court between Algot Gustafson as plaintiff and Jesse Noble, Ben Boone, Luther C. Hess and Ed Jern, defendants, the said plaintiff sued for the foreclosure of certain laborers' liens upon and against that certain placer mining claim known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, in the Fairbanks Recording District, District of Alaska, and owned by the said defendants Luther C. Hess, Ben Boone and Jesse Noble, wherein a decree was rendered [223] on the 6th day of April, 1912, adjudging said claims of lien to be valid and subsisting claims against said property and estate, and that the said property and estate be sold to satisfy the same; and the said defendants Ben Boone, Luther C. Hess and Jesse Noble have obtained from the said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment as aforesaid; and a citation directed to the said plaintiff Algot Gustafson is about to be issued citing and admonishing him to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California.

Now, the condition on the above obligation is such that if the said defendants Jesse Noble, Ben Boone and Luther C. Hess shall prosecute their said appeals to effect and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation is

to be void, otherwise to remain in full force and virtue.

BEN BOONE.

By ARTHUR FRAME, Atty.

JESSE NOBLE.

By ARTHUR FRAME, Atty.

LUTHER C. HESS,

Principals.

PETER VIDOVICH,

Sureties.

United States of America,

District of Alaska,—ss.

Peter Vidovich, whose names are subscribed to the above and foregoing undertaking as sureties, being first duly sworn, each for himself deposes and says: That he is a resident of the Fairbanks Precinct, District of Alaska; that he is not a counsellor or attorney at law, marshal, clerk of any court, or other officer of any court;

That he is worth the sum specified in the foregoing [224] undertaking, to wit, the sum of Fifteen Hundred (\$1500) Dollars, exclusive of property exempt from execution, over and above all his just debts and liabilities.

PETER VIDOVICH.

Subscribed and sworn to before me this 26th day of April, A. D. 1912.

[Notarial Seal]

ARTHUR FRAME,

A Notary Public for Alaska.

Sufficiency of surety on the foregoing bond approved this 27th day of April, 1912.

PETER D. OVERFIELD,
District Judge.

O. K.

G. B. ERWIN,
Attorney for Plaintiff.

Due and legal service of the within and foregoing bond on appeal is hereby admitted this 26th day of April, 1912.

G. B. ERWIN,
Attorney for Plaintiff.

[Endorsed]: No. 1664. In the District Court for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Bond on Appeal. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 27, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. J. L. McGinn & Arthur Frame, Attorneys for Defts., Fairbanks, Alaska. [225]

[Title of Court and Cause.]

Citation on Appeal.

United States of America,
District of Alaska,—ss.

The President of the United States: To Algot Gustafson, the Above-named Plaintiff:

YOU ARE HEREBY CITED AND ADMONISHED to appear and to be at the United States Circuit Court of Appeals for the Ninth Circuit within thirty (30) days from the date of this

writ, pursuant to an order allowing an appeal, made and entered in the above-entitled cause, in which Jesse Noble, Ben Boone and Luther C. Hess are defendants and appellants and Algot Gustafson is plaintiff and respondent in said appeal, to show cause, if any there be, why the judgment rendered in said cause in the said District Court for the said District of Alaska, Fourth Judicial Division, against the defendants therein, should not be set aside, corrected and reversed, and why speedy justice should not be done to Jesse Noble, Luther C. Hess and Ben Boone in that appeal.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this the 27th day
of April, 1912.

[Seal] PETER D. OVERFIELD,
District Judge for the District of Alaska, Fourth
Judicial Division.

Attest: C. C. PAGE,
Clerk.

By H. C. Green,
Deputy. [226]

Service of the foregoing is hereby accepted this
the 27th day of April, 1912.

G. B. ERWIN,
Attorney for Plaintiff. [227]

[Endorsed]: No. 1664. In the District Court for
the Territory of Alaska, Third Division. Algot Gus-
tafson, Plaintiff, vs. Jesse Noble et al., Defendants.
Citation on Appeal. [228]

*In the District Court of the Territory of Alaska,
Fourth Judicial Division.*

No. 1664.

ALGOT GUSTAFSON,

Plaintiff,

vs.

JESSE NOBLE, BEN BOONE, LUTHER C. HESS
ED JERN,

Defendants.

Order Extending Time to Docket Cause.

Now on this 27th day of April, 1912, the above-entitled cause came on to be heard before the judge of the above-entitled court upon a petition of the appellants for an order extending the return day, the plaintiff appeared by his attorney Guy B. Erwin, and the defendants Luther C. Hess, Ben Boone and Jesse Noble by their attorneys John L. McGinn and Arthur Frame, and the said defendants and appellants requested an order extending the time in which to docket said cause and to file the record therein with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and showed that the same is necessary by reason of the great distance, and slow and uncertain communication, between the town of Fairbanks, Alaska, and the City of San Francisco, California; and the judge of said court, upon the hearing of said motion, being fully advised in the premises, and deeming that good cause exists therefor,

IT IS HEREBY ORDERED: That the time

within which said appellants shall docket said cause on appeal be, and the same is hereby, enlarged and extended to and including the first day of August, 1912.

PETER D. OVERFIELD,
District Judge.

Due and legal service of a copy of the within instrument is hereby acknowledged this 27th day of April, 1912.

G. B. ERWIN,
Attorney for Plaintiff.

Entered in Court Journal No. 11, page 857. [229]

[Endorsed]: No. 1664. In the District Court for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Order Extending Time to Docket Cause. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 27, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [230]

[Title of Court and Cause.]

Order Extending Time to Docket Cause.

It having been stipulated by and between the plaintiff and the defendants that the defendants herein may have until and inclusive of the first day of September, 1912, in which to file their transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and good cause appearing therefor,

It is hereby ordered that the time for filing the transcript on appeal with the Clerk of the United

States Circuit Court of Appeals for the Ninth Circuit, shall be extended to and inclusive of the first day of September, 1912.

PETER D. OVERFIELD,

Dated Fairbanks, Alaska, the 18th day of June, 1912.

O. K.

G. B. ERWIN,

Attorney for Plaintiff.

Entered in Court Journal No. 12, page 85. [231]

[Endorsed]: No. 1664. In the District Court. Algot Gustafson vs. Jesse Noble et al. Order Extending Return Day. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 18, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [232]

[Title of Court and Cause.]

Clerk's Certificate to Transcript.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing and hereto annexed two hundred and thirty-two (232) typewritten pages, numbered from 1 to 232, inclusive, constitute a full, true and correct copy, and the whole thereof, including indorsements, of the original files in cause No. 1664 in accordance with the praecipe of the defendants and appellants on file herein and made a part hereof, wherein Algot Gustafson is plaintiff and appellee,

and Jesse Noble et al. are defendants and appellants, and that the same is by virtue of the order of appeal and citation issued in said cause and is the return thereof in accordance therewith; and

I do further certify that this transcript was prepared by me in my office and that the cost of preparation, examination and certificate, amounting to Ninety and 37/100 Dollars (\$90.37) has been paid to me by counsel for the defendants and appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court, at Fairbanks, Alaska, this 29th day of June, 1912.

[Seal]

C. C. PAGE,
Clerk.

By H. C. Green,
Deputy.

[Endorsed]: No. 2170. United States Circuit Court of Appeals for the Ninth Circuit. Jesse Noble, Ben Boone and Luther C. Hess, Appellants, vs. Algot Gustafson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Fourth Division.

Filed August 8, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Title of Court and Cause.]

Stipulation Relative to Printing of Record.

IT IS HEREBY STIPULATED AND AGREED:
That in the printing of the record herein for the consideration of the Court of Appeals, that the title of the court and cause in full on all papers shall be omitted, excepting the first page, and inserted in place and stead thereof "Title of Court and Cause."

Done at Fairbanks, Alaska, April 26, 1912.

G. B. ERWIN,

Attorney for Plaintiff.

JOHN L. MCGINN and

ARTHUR FRAME,

Attorneys for Defendants Noble, Hess and Boone.

[Endorsed]: No. 1664. In the District Court for the Territory of Alaska, Third Division. Algot Gustafson, Plaintiff, vs. Jesse Noble et al., Defendants. Stipulation Re Printing Record. Filed in the District Court Territory of Alaska, 4th Div. May 4, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. J. L. McGinn & Arthur Frame, Attorneys for Defts. Fairbanks, Alaska.

No. 2170. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 8, 1912. F. D. Monckton, Clerk.

No. 2170

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE NOBLE, BEN BOONE, and
LUTHER C. HESS,

Appellants,

VS.

ALGOT GUSTAFSON,

Appellee.

BRIEF FOR APPELLANTS

Upon Appeal from the United States District Court for
the District of Alaska, Fourth Division

F. J. KIERCE,
WALTER CHRISTIE,
Attorneys for Appellants.

Filed this _____ day of November, 1912.

FRANK D. MONCKTON, Clerk.

By _____ Deputy Clerk.

FILED

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE NOBLE, BEN BOONE, and
LUTHER C. HESS:

Appellants,

vs.

ALGOT GUSTAFSON

Appellee.

No. 2170

Brief for Appellant.

THE CASE.

This is an action in equity for the foreclosure of alleged miners' liens assigned to appellee.

The complaint alleges that plaintiff and his various assignors performed work and labor upon a mining claim known as Creek Placer Mining Claim Number Two (2) above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska, which work consisted in running tunnels, opening cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches and

timbering shafts upon said mine and premises, for the development and improvement thereof. One of the assignors labored as a cook for the other men.

The Complaint also alleges appellants to be the owners of said claim, that the work performed was done at the instance of one Jern, appellants' lessee, that appellants had knowledge thereof, that plaintiff and his assignors duly recorded liens, that the various claimants duly assigned to plaintiff their liens, that three hundred dollars is a reasonable sum to be allowed as attorney's fee and that appellants did not post notices of non-liability. Each lien was also set up as an exhibit to the complaint. (Tr. 3-28.)

The answer of appellants denies all of the allegations of the complaint save that an admission of the ownership of said claim in appellants Hess and Boone is made.

The answer also sets up as affirmative defense that said claim has been operated by the lessees of the owners for more than two years prior to the institution of said suit as a placer mining claim, that said Jern as assignee of the owners' lessee operated said claim from September 2, 1910, to June 5, 1911, and all work and labor performed upon said property by claimants was performed in the operation of said property as a placer mine and in extracting and removing the pay dirt and gold dust therefrom; also that the owners posted and kept posted in conspicuous places notices of their non-liability for any work. (Tr. 28-32.)

In reply, plaintiff denies the allegations of said answer and alleges that the work done by himself and his assignors was performed in the development and improvement of said claim in opening up and prospecting a virgin block of ground, in the endeavor to find gold in paying quantities. (Tr. 32-33.)

Upon these issues the action was tried before Hon. Peter D. Overfield.

STATEMENT OF THE FACTS.

Algot Gustafson, the plaintiff in the action, went to work on said mining claim on November 14th, 1910, and continued to work thereon until the 1st of June, 1911, at an agreed wage of \$5.00 per day and board. He was paid in full for all his services up to and including April 30, 1911. From the 1st of May, 1911, to the 1st of June in the same year, he worked 29 days and 5 hours, for which he was not paid. During the period of time for which he was not paid he was working in the boiler house, thawing out the dump, and between times he did some work in sluicing up the dump and fixing up the ditch. (Tr. 38-39.)

The dirt in the dump from an old shaft had been taken out the winter before, and also from a new block of ground which had been opened up some time in February or March of 1911.

Gust. Honk, one of plaintiff's assignors, was employed at \$7.00 and board, and was unpaid for the time he worked between May 16th and June 1st in 1911, during which time he was making cribbing for about five or six days. The balance of the time he was running the boiler, fixing the ditch and sluicing the dump. (Tr. 46-47.) Honk had also been paid for his work prior to the 16th of May, 1911.

Thomas Wright, another of plaintiff's assignors, worked as a cook, from April 1st to June 8th, 1912, at \$5.00 per day and board, for thirty days of which time he was paid, leaving him unpaid from May 1st to June 8th. (Tr. 59.)

Victor Anderson, the third of plaintiff's assignors, was unpaid from May 1st, 1911, to June 1st of the same

year, his claim of lien being for 21 days from May 1st to May 26th, whereas he worked 21 days only between May 1st and June 1st. (Tr. 66.) During this time he was engaged in sluicing the dump and fixing the ditch. He spent about five days on the ditch. (Tr. 67.)

Knute Peterson, the fourth of plaintiff's assignors, worked from April 29th to June 3d, 1911, at \$5.00 per day, for which he was unpaid. During this time he put in about four days on the ditch and the rest of the time shoveling the dump into the sluice boxes. (Tr. 77.)

Carl Strass, the fifth of plaintiff's assignors, worked from May 16th to June 4th, 1911, at \$6.00 per day, for which he was unpaid, of which time he worked about seven days on the ditch and the balance of the time in sluicing the dump. (Tr. 80.)

The greater portion of the dirt on the dump had been taken from an old shaft which had been worked for more than two years prior to May, 1911. (Tr. 47, 58, 74, 85.)

During February and March of 1911 the men had opened up a new block of ground and driven a shaft and two tunnels. (Tr. 48.) All the men who were engaged in this development work had been paid in full for their time, and after the 1st of May, 1911 (up to which time all the men had been paid), no further work had been done on the virgin ground. What work was done was the fixing of the side of an old ditch whenever it broke out and sluicing the dump. This ditch had been constructed some two years previous. (Tr. 95.)

This placer mine had been leased in 1909, about March 23d, to one Erickson, who testified that he posted a notice of the non-liability of the owners of the claim. He received the notice from the defendant Noble in June, 1910, and posted it on the center upper initial post. (Tr. 94.)

This post was about four feet high, in a conspicuous place, so that a man walking up and down the ditch could

see the notice. Erickson had a boiler house on the claim at this time, but as it was to be torn down he did not post the notice on it. (Tr. 96.)

Luther C. Hess, one of the owners, was on the claim in the fall of 1910 and found a notice of non-liability posted on the lower center post. (Tr. 103-104.) This post could be seen for a distance of more than 200 feet. (Tr. 107.)

Jesse Noble, one of the defendants and at one time one of the owners of the claim, in August, 1910, saw the notice which Erickson posted on the upper end, and at the same time posted one at the lower end. (Tr. 113.) At that time Jern was in possession of the ground as assignee of Erickson. Noble kept the notices posted until spring, and as long as the men worked on the claim. He had them removed some time in the fall of 1911. At the time Noble posted the notices in the fall of 1910 there was a boiler house on the claim which was to be torn down. (Tr. 116.)

Charles E. Schon, who was working on Number 3, above Discovery, in the month of May, 1911, saw a notice of non-liability posted on the upper stake of Number 2. This notice was signed by Jesse Noble, Ben Boone and Luther Hess. (Tr. 129.)

The only conflict of testimony arises in regard to the posting of these notices. Each one of the lien claimants testified that they did not see any notices. In addition to this, the plaintiff called in rebuttal two men who had sub lays from Jern and who had in the spring of 1911 been working on the lower part of the claim. They both testified that they had seen none of the notices posted by Erickson and Noble. (Tr. 138-150.)

Jern was not called at the trial, as he was absent from Fairbanks, but it was stipulated by plaintiff's counsel that if present he would testify that notices of non-liabil-

ity were posted in conspicuous places on said claim and they could easily be seen; to wit: one at the lower end of said claim and the other at the upper end. (Tr. 36.)

In the complaint and in the various liens the allegation of labor done is as follows: "*as miner and laborer in digging tunnel, running cross-cuts, drifting cut, excavating and hoisting gold-bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening, development and working of same.*" (Tr. 17.)

These are substantially the facts testified to by the various witnesses, and upon which the Court rendered a verdict in favor of the plaintiff for the foreclosure of the various liens, together with interest from the date of recordation of said liens, costs and \$300.00 attorney's fee.

From such judgment the defendants appeal and specify the following errors as ground for reversal:

ASSIGNMENT OF ERRORS.

I.

The Court erred in admitting in evidence plaintiff's exhibits "G," "H," "I," "J," "K" and "L," over the objection of said defendants, for the reasons: First, that each of said claims of lien was incompetent; second, that the items of work for which each of said liens was claimed are not lienable under our statute, and that it is for different work, labor and services than that shown by the testimony to have been performed by said plaintiff and lien claimants.

II.

The Court erred in overruling the motion of said defendants, made at the conclusion of plaintiff's case, to dismiss said action and for judgment of dismissal in favor of said defendants, for the reasons specified in said

motion, to wit: First, that the evidence introduced by the plaintiff did not sustain any of the allegations of the complaint; second, that all of the testimony shows that the work and labor which had been done on said ground had been done in the operation of the property as a placer mine, and was not work or services for which the statute gives a lien.

III.

The Court erred in denying defendants' motion, made at the conclusion of the trial of said cause, for judgment in favor of said defendants, upon the grounds specified in said motion, to wit: That there was a total variance between the allegations of the complaint and the testimony that had been introduced by the plaintiff; that the statute does not give a lien for any of the work proven to have been performed during the time for which the liens are claimed; that there was a total lack of evidence to support a judgment against the defendants Luther C. Hess, Ben Boone and Jesse Noble; that there was a total lack of evidence to support a judgment of foreclosure of the liens; and that the testimony which had been introduced by the defendants showed that notices of non-liability had been kept posted upon the ground, and that, even if such notices were not so kept posted, the work and labor which the plaintiff and the lien claimants performed was performed in the operation of the property as a placer mine in extracting the gold-dust and gold-bearing gravels therefrom, for which work it is not the theory of the law that notices of non-responsibility shall be given.

IV.

The Court erred in refusing to make and adopt the finding of fact requested by the defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 1 of

the proposed findings of fact of said defendants, to wit:

“That the above-named defendants Luther C. Hess and Ben Boone now are, and at the time of the commencement of this action were, the owners of that certain placer mining claim situate in the Fairbanks Recording District, District of Alaska, Fourth Judicial Division, known and described as creek claim Number 2 Above Discovery on Wolf Creek; that the said claim is a placer mining claim valuable for the gold contained within its boundaries, and that the same has been operated by the lessees of the owners of said claim for a period of more than two years prior to the institution of said action; that on the 23d day of March, 1909, the owners of said property executed to one Charles J. Erickson a lease to work and mine said property, which said lease the said Erickson did thereafter and on the 2d day of September, 1910, assign and transfer to the above-named defendant Ed Jern, who thereupon took possession of the said property and thereafter and until about the 9th day of June, 1911, was engaged in the operation of the same as a placer mine and in removing and extracting the pay-dirt and gold-dust and other valuable minerals therefrom.”

V.

The Court erred in refusing to make and adopt the finding of fact requested by the defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 2 of the proposed findings of fact of said defendants, to wit:

“That during the winter of 1910-11 the said Ed Jern, in the course of his mining operations of said property as a placer mine, was engaged in removing and hoisting the pay-dirt therefrom and placing the same upon the surface of the ground in a dump, with

the exception of a portion of the months of February and March, during which time the said Jern was engaged in sinking a shaft upon a piece of virgin ground upon said property and running tunnels; that said shaft was sunk to a depth of about forty feet and the tunnel run up and down said claim from the bottom of said shaft a distance of about one hundred feet each side of said shaft, and the dirt taken from said tunnel was placed in the dump which had been removed from said property by said Jern in his operations of the same and for which said Jern had paid his workmen in full; and that during the months of April and May, 1911, and particularly at the time when the said plaintiff Algot Gustafson and the other lien claimants mentioned in the complaint claim to have performed services in sinking a shaft and running cross-cuts and tunnels upon said property, the said Ed Jern was engaged in the work of sluicing the dump which had been theretofore and during the said winter of 1911 hoisted from said claim and placed upon the surface thereof, and also during the latter part of said month of May, 1911, keeping in repair the ditch that had been theretofore and during the falls of 1909 and 1910 constructed for the purpose of conveying water to said property to enable them to sluice up the gold-bearing gravels removed therefrom."

VI.

The Court erred in refusing to make and adopt the finding of fact requested by defendants Jesse Noble, Luther C. Hess and Ben Boone, contained in paragraph 3 of the proposed findings of fact of the said defendants, to wit:

"That the said Charles J. Erickson posted upon said property in a conspicuous place thereon, in about

the month of July, 1910, a notice to the effect that the owners of said claim would not be responsible for any debts contracted by laymen on account of labor performed and materials furnished and used on said property, which said notice was placed upon the upper center stake of said property; and that thereafter and about the month of August, 1910, the above-named defendant Jesse Noble posted on the lower center stake of said property a notice to the same effect; that said notices remained so posted until the spring of 1911; and that again, in the month of March, 1911, the said Noble posted on said upper center stake, to replace the said notice that said Erickson had theretofore posted upon said stake, a third notice to the effect that the owners of said property would not be responsible for any debts contracted by lessees on account of labor performed or materials furnished and used upon said claim; each of which said notices was signed by the owners Luther C. Hess and Ben Boone.”

VII.

The Court erred in refusing to make and adopt the conclusion of law requested by defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 1 of the proposed conclusions of law of the said defendants, to wit:

“That the work and labor done and performed by the said plaintiff Algot Gustafson and by the other lien claimants Victor Anderson, Thomas Wright, Gust Honk, Carl Strass and Knute Peterson was done and performed upon said claim in the operation and ordinary working of the same as a placer mine; and that the work done thereupon, to wit, sluicing up the dump and repairing the ditch, was all incident to the mining operations being carried on on said property,

and that for such work and labor the laws of the District of Alaska do not give laborers any lien."

VIII.

The Court erred in refusing to make and adopt the conclusion of law requested by defendants Luther C. Hess, Ben Boone and Jesse Noble, contained in paragraph 2 of the conclusions of law requested by said defendants, to wit:

"That the said plaintiff is not entitled to the relief sought; and that the said defendants are entitled to a judgment dismissing said cause, and for their costs and disbursements necessarily incurred."

IX.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 1 of the Findings of Fact filed herein on April 6th, 1912, which is as follows, to wit:

"That between the 1st day of April, 1911, and the 9th day of June, 1911, one Thomas Wright performed sixty-eight days' work and labor upon that certain placer mining creek claim known as Creek Placer Mining Claim Number Two (2) Above Discovery on Wolf Creek, a tributary of Cleary Creek, in the Fairbanks Recording District, Territory of Alaska; that said work and labor so performed by the said Thomas Wright upon said mine and premises described was performed by him as cook for workmen and laborers engaged in the development and improvement of said mine and premises in sinking shaft and running tunnels in opening up a block of virgin ground in said mine and in sluicing and washing the gold-bearing gravels excavated and hoisted from said workings, and in repairing and keeping in repair a certain

water ditch used to convey water to said premises for sluicing purposes, for the development and improvement thereof; that such work and labor was done upon said premises at the request of the defendant Ed Jern, who at said time was in charge of the development and improvement of said mine, who promised to pay said Thomas Wright \$5.00 per day and board for each and every day's work so done as aforesaid; that the said Thomas Wright commenced the performance of said work and labor on the 1st day of April, 1911, and ceased said work and labor on the 9th day of June, 1911, and during said period earned the total sum of \$340; that no part of said sum has been paid except the sum of \$150 on account thereof, and that there now remains due and owing for said work and labor the sum of \$190 after deducting all just credits and offsets."

X.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 2 of the Findings of Fact filed herein on April 6th, 1912, which is as follows, to wit:

"That between the 1st day of May, 1911, and the 26th day of May, 1911, one Victor Anderson performed twenty-one (21) days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek hereinbefore described; that said work and labor was done and performed in the construction, development and improvement of said mine and premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that five (5) days of such work and labor was done and performed in repairing

and keeping in repair the water ditch used in connection with said mine and premises for the development and improvement thereof; that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Victor Anderson \$5.00 per day and board for each and every day's work so done as aforesaid; that the said Victor Anderson commenced to work and labor upon said mine and premises under a continuing contract long prior to the said 1st day of May, 1911, and ceased said work and labor on the 26th day of May, 1911, and between said dates last mentioned earned the total sum of \$105.00; that no part of said sum has been paid and there now remains due and owing for said work and labor the sum of \$105 after deducting all just credits and offsets."

XI.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 3 of the Findings of Fact filed herein on April 6th, 1912, which is as follows, to wit:

"That between the 16th day of May, 1911, and the 1st day of June, 1911, one Gust Honk performed eight days and nine hours' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek hereinbefore described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft and tunnels run in the development and improvement of said mine, and that five (5) days of such work and labor was done in repairing and keeping in repair and improving the

water ditch used in connection with said mine and premises; that said Gust Honk was foreman in charge of the work on said mine and premises, and that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Gust Honk \$7.00 per day and board for each and every day's work and labor done and performed as aforesaid; that said Gust Honk commenced to work and labor on said mine and premises under a continuing contract long prior to the said 16th day of May, 1911, and ceased to labor thereon on the 1st day of June, 1911, and between said dates last mentioned earned the total sum of \$62.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$62.50 after deducting all just credits and offsets."

XII.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 4 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That between the 29th day of April, 1911, and the 3d day of June, 1911, one Knute Peterson performed twenty-nine and one-half days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek above described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that four (4) days of such work and labor was done in re-

pairing and keeping in repair the water ditch used in connection with said mine and premises for the improvement thereof, and said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said Knute Peterson \$5.00 per day and board for each and every day's work and labor done and performed by him on said mine as aforesaid; that the said Knute Peterson commenced to work and labor on said mine and premises on the 29th day of April, 1911, and ceased to labor thereon on the 3d day of June, 1911, and during said period earned the total sum of \$145.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$145.50 after deducting all just credits and offsets."

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 5 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That between the 16th day of May, 1911, and the 4th day of June, 1911, one Carl Strass performed nineteen (19) days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, above described; that said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine, and that seven (7) days of such work and labor was done in repairing and keeping in repair the water ditch used in connection with said work and for the improvement thereof, and was done and performed at the request of the

defendant Ed Jern, the person in charge of the development and improvement of 'said mine and premises, who promised to pay said Carl Strass \$6.00 per day and board for each and every day's work and labor done and performed as aforesaid; that the said Carl Strass commenced to work and labor on said mine and premises on the 16th day of May, 1911, and ceased to labor thereon on the 4th day of June, 1911, and during said period earned the total sum of \$114.00; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$114.00 after deducting all just credits and offsets."

XIII.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 6 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That between the 1st day of May, 1911, and the 1st day of June, 1911, the plaintiff Algot Gustafson performed twenty-nine and one-half days' work and labor upon said creek placer mining claim Number Two (2) Above Discovery on Wolf Creek, hereinbefore described; that said work and labor was done in the construction, development and improvement of said mining premises in firing the boiler, thawing dump, and in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine and in repairing and keeping in repair the water ditch used in connection with said premises; that said work and labor was done and performed at the request of the defendant Ed Jern, the person in charge of the development and improvement of said mine and premises, who promised to pay said plaintiff \$5.00

per day and board for each and every day's work and labor done and performed as aforesaid; that said plaintiff commenced to work and labor on said mine and premises under a continuing contract long prior to the said 1st day of May, 1911, and ceased to labor thereon on the 1st day of June, 1911, and between said dates last mentioned earned the total sum of \$147.50; that no part of said sum has been paid, and there now remains due and owing for said work and labor the sum of \$147.50 after deducting all just credits and offsets."

XIV.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 8 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That on the 23d day of March, 1909, the then owners of said claim executed a lease in favor of one Charles J. Erickson to work and mine said claim, and that thereafter and on the 2d day of September, 1910, said Erickson transferred his interest in said lease to the defendant Ed Jern, and that thereafter and during all the times the plaintiff and the lien claimants were performing work and labor on said claim, the defendant Ed Jern was in possession of said claim as the agent and lessee of the owners and had charge of the improvement and development thereof, and that during all of said time the defendants Jesse Noble, Luther C. Hess and Ben Boone had actual knowledge of the construction, development and improvement of said mine and premises, and of the hiring and employment of the plaintiff Algot Gustafson and the said lien claimants Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass therein, and of the work and labor done and per-

formed by them and each of them as aforesaid upon said mine and premises in the development thereof and the construction of said improvements thereon; and that said development and improvements upon said mine and premises enhanced and increased the value thereof to the extent of said work done thereon.”

XV.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 9 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

“That the defendants Luther C. Hess, Ben Boone and Jesse Noble, after they had knowledge of the development and improvement of said mine and premises, failed to give notice that they would not be responsible for the work and labor done upon said premises by posting and keeping posted a notice in writing to that effect in a conspicuous place upon the said mining claim and premises or upon any building or other improvement situate thereon.”

XVI.

The Court erred in making and filing in said cause the finding of fact set forth in paragraph 10 of the Findings of Fact filed herein on the 6th day of April, 1912, which is as follows, to wit:

“That on the 12th day of June, 1911, and within thirty (30) days after the plaintiff Algot Gustafson and the said Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass had ceased to work upon said mine and premises, for the purpose of perfecting and securing a lien upon said mine and premises under the provisions of Chapter 28, Title III of the Alaska Code of Civil Procedure, each of

the said claimants Algot Gustafson, Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass caused to be prepared and filed for record in the office of the recorder in and for the Fairbanks Recording District, Territory of Alaska, wherein said mine and premises are situate, a notice and claim of lien containing a true statement of his respective demand, after deducting all just credits and offsets, with the name of the owners and reputed owners of the said mine and premises, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien sufficient for identification, which claims of lien were each duly verified by the oath of the respective claimants and the same were thereafter duly recorded in the records of said Fairbanks Recording District."

XVII.

The Court erred in making and filing in said cause the conclusion of law set forth in paragraph 1 of the Conclusions of Law filed herein on the 6th day of April, 1912, which is as follows, to wit:

"That the said liens of claimants Algot Gustafson, Thomas Wright, Victor Anderson, Gust Honk, Knute Peterson and Carl Strass, and each of them, were and are valid and subsisting liens for the amounts therein claimed, against the estate of the said defendants Luther C. Hess, Ben Boone and Jesse Noble in the mine and premises therein described."

XVIII.

The Court erred in making and filing in said cause the conclusion of law set forth in paragraph 2 of the Conclusions of Law filed herein on the 6th day of April, 1912, which is as follows, to wit:

“That the said liens and each and all of them may be foreclosed in the manner provided by law, and the estate of the said defendants Luther C. Hess, Ben Boone and Jesse Noble in said premises sold to satisfy the said liens and each of them, together with \$22.20 filing fees, \$300 attorney’s fees, and interest and costs, and that decree may issue in accordance herewith.”

XIX.

The Court erred in rendering and entering judgment of foreclosure.

ARGUMENT.

The practically undisputed facts are:

(a) That the plaintiff and his various assignors performed labor upon said mining claims during the interval extending from the 1st day of May, 1911, to the 7th or 8th day of June, 1911.

(b) That all and any work performed by plaintiff or his assignors prior to the 1st day of May, 1911, has been paid.

(c) That the development work and specifically the sinking of the new shaft and driving of tunnels in virgin ground had all been done prior to the 1st day of May, 1911.

(d) That there was upon the mining claim an old shaft which had been sunk two or three years previous to the 1st day of May, 1912, and from which dirt was taken prior to May 1st, 1912, and placed on the dump.

(e) That all dirt taken from the virgin ground and placed on the dump was co-mingled with the dirt taken from the old shaft. That no dirt was taken from virgin ground subsequent to the 30th day of April, A. D. 1911.

(f) That a 1400 foot ditch had been constructed on said claim two or three years prior to the first day of May, 1911.

(g) That all the labor performed by plaintiff and his various assignors, save that of the cook and for which a lien is claimed, consisted of thawing out and sluicing the dump and making such repairs on the ditch as were incident to its use in the operation of an ordinary placer mining claim. That a small amount of cribbing was made, but the same was never used.

(h) That Ed Jern employed plaintiff and his various assignors in his capacity as lessee of the owners.

(i) That the owners of the mining claim at the time of foreclosure of said liens were the defendants, Luther C. Hess and Ben Boone. That Jesse Noble had previously owned an interest in said claim, but at this time no longer held such interest.

The disputed facts are these:

That Charles G. Erickson, at one time the lessee of the owners, and Jesse Noble, at one time one of the owners, posted several notices on the upper and lower boundary post, which notices declared that the owners would not be liable for any wages or indebtedness contracted by the laymen or the lessee, which fact is disputed by plaintiff and his assignors in their declarations that they did not at any time see any such notices posted on the claim.

With these facts we proceed to discuss the points of law involved and the evidence:

FATAL VARIANCE BETWEEN LIENS AND PROOFS.

The evidence shows beyond all question that the

work performed by the various lien claimants during the periods embraced in the claims of lien was of an entirely different character than that set forth in the claims of lien and the complaint. This appeared on the direct evidence offered by them.

Gustafson, the plaintiff, claimed a lien for 29½ days' work performed between May 1st, 1911, and June 1st, 1911. The work as set out in his claim of lien is as follows: "*As miner and laborer in digging tunnel, running cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches, and timbering shafts in the improvement, opening up, development and working same.*" (Tr. 27.)

His testimony on this point was as follows:

"Q. (By MR. ERWIN.) Just state what work and "how many days' work you claim there that you "have not been paid for. How many days—

"MR. FRAME: During what time?

"A. It is from the 1st day of May to the 1st "of June. Some times I lost a half a day or so; "but some 29 days and some hours, 5 hours, I think. "(Tr. 38.)

"Q. What work were you performing on the "claim at that time?

"A. I was working in the boiler-house most of "the time.

"Q. I mean, between the 1st of May and the "1st of June.

"A. That was the time. When any work had "to be done in the boiler-house I was working "there. Between times I would help the boys out.

"Q. What work were you doing in the boiler-"house?

"THE COURT: I cannot tell from your testimony "what kind of work you were doing there.

“A. Your Honor, you see, at that time of the
 “year we were thawing the dump and getting
 “ready for to sluice the dump. In the meantime we
 “were fixing up for the drifting, preparing for the
 “work in the summer. When we had fire in the
 “boiler thawing the dump I was working in the
 “boiler-house.

“Q. What were you doing in the boiler-house;
 “sharpening picks, or what?

“A. Running the hoist and firing the boiler.
 “When there was no work to do in the boiler-house,
 “I went out and worked at whatever I was told
 “had to be done.

“Q. (By MR. ERWIN.) What would that work
 “consist of, outside the boiler-house?

“A. It was sluicing up the dump, and fixing up
 “the ditch, and such a thing.

“Q. Were you ever underground?

“A. Not at that time.

“Q. You say you never did any work under-
 “ground?

“A. No, sir.” (Tr. 39.)

It is apparent from his testimony that he performed an entirely different class of work than that claimed in the lien.

Gust Honk, another claimant, claimed a lien for 8 days and 9 hours' work and labor performed between May 16th, 1911, and June 1st, 1911. The work set out in his claim of lien is set out in the identical words used in Gustafson's claim of lien.

His testimony as to the character of his work is as follows:

“Q. What labor were you doing on that claim
 “between the 16th day of May and the 1st day of
 “June, during the time you claim a lien?

“A. Well, I was working all right. But the
 “most of the time I was ruining the boiler, fixing
 “up cribbing for the summer shaft and I was also
 “on the dump.

“Q. Can you segregate the time that you were
 “working on the cribbing for the summer shaft?

“A. No.

“Q. Do you know how many days you worked
 “at that? A. No, I couldn’t say exactly.

“Q. About how many? What proportion of the
 “time?

“(Mr. Frame objects. Objection overruled.)

“A. I was picking out the cribbing, sawing them
 “and cutting them out. I guess it would take five
 “or six days perhaps.

“Q. I would like you to be sure about that if
 “you can, just what time you performed that class
 “of labor.

“A. That is pretty hard for a man to tell when
 “he is working like that.

“Q. What other work did you do there?

“A. I would go up on the ditch and fix the ditch
 “once in a while, so that the boys could keep on
 “sluicing right along. They were sluicing at the
 “time.” (Tr. 46.)

On cross-examination he testified as follows:

“Q. Now, you testified a few minutes ago that
 “you had spent at least five days and a half work-
 “ing on that ditch? A. Yes, I did.

“Q. You mean during the time you claim this
 “lien for? A. During the time.

“Q. You say that during the time you claim this
 “lien you spent five days and a half working on
 “that ditch?

“A. Yes, sir. I did.

“Q. You were also, during that time, working
“sluicing? A. Exactly.

“Q. You gave a portion of your time superin-
“tending the work of sluicing and cleaning up, and
“superintending the work, all the mining operations
“going on there?

“A. Yes, on the Ed Jern lay I was supposed to
“represent his part of it.

“Q. And in this lien you say that you worked
“eight and a half days continuously?

“A. Eight days and nine hours I think.

“Q. Now, I will ask you if you didn't testify
“this morning that you worked about six days of
“that time in making cribbing?

“A. No. I don't think I did. Not in that time.
“I meant from the first part of May and not from
“the 16th part of May.

“Q. You are absolutely sure of that?

“A. Yes. I don't think I did. I am not quite
“certain.

“Q. Your best recollection is now that this
“morning you didn't testify that you spent about
“six days in cribbing?

“A. Making cribbing it was, cutting them out.
“I was doing most of that work myself.

“Q. When did you say you did that work?

“A. In the month of May.

“Q. It was not after the 16th of May?

“A. No, I never said that exactly; part of it
“might have been, and part not.

“Q. Didn't you say this morning that all of that
“work was done after the 16th of May?

“A. No, I don't think I did.

“Q. Didn't you say that all of your time was
“put in making that cribbing and superintending

“the sluicing of the dump and the cleanup that was going on? A. In May, but not after the 16th.

“Q. After the 16th of May, during the time you claim a lien for?

“A. No. I must have misunderstood it.

“Q. There is no misunderstanding now?

“A. About what?

“Q. About what you have been testifying to.

“A. Not concerning that now.

“Q. There is no misunderstanding now about what you have been testifying to?

“A. No, not that I know of. I know for sure I put in between five and six days on the ditch, and I put in some time on the cleanup from the 16th of May up to the time I quit.

“Q. You are sure that you put in five and a half days after the 16th day of May upon this ditch?

“A. Yes, and I can show the reason why.

“Q. How much time after the 16th of May did you spend in making cribbing?

“A. That is a time I couldn't say exactly. But on the ditch, I can be sure of.

“Q. Why can you be sure?

“A. When the frost begins to get out of the ground it is much easier for the water to cut down.

“Q. Why can you be so sure that you can say to the Court that you spent at least five and a half days on that ditch after the 16th of May?

“A. Yes, I am certain of that.

“Q. Explain to the Court your reason, how you arrive at that.

“A. The latter part of May was the time that the ditch started in to bother us. It was bother-

“ing us occasionally before. Mr. Anderson and
 “Shon and Erickson, when they were sluicing and
 “using the water, we had very little trouble with
 “the ditch. But after they got through, then was
 “when the trouble started in. It seems we got the
 “benefit of all the trouble. That is the reason, it
 “seems, why we put in so much time, because I
 “had to be on the ditch almost at all times, I might
 “say.

“Q. Because the ditch began to give trouble in
 “the latter part of May, you are absolutely sure
 “you spent at least five and a half day’s work on it?

“A. I am. Yes.

“Q. That is your only reason? A. Yes.

“Q. That is the only reason that enables you to
 “fix the time at five days?

“A. At least that, I am certain of it.

“MR. FRAME: That is all.” (Tr. 86-88.)

Honk’s testimony, it will readily be seen, is in direct
 variance with his sworn statement in the claim of lien.

Thomas Wright, the cook, alleged that he worked as
 cook for the men employed on this mine, as set out in
 their claim of liens. His testimony shows only his work
 as cook, and, of course, if the others have no lien he
 has none.

Victor Anderson, in his claim of lien, used the same
 identical language as the other claimants. Let us see
 what services he really performed:

“Q. What work were you doing on that claim
 “from the 1st of May until the 26th of May?

“A. I was sluicing the dump in, and fixing up
 “the ditch.

“Q. How much of the time did you put in sluic-
 “ing the dump? Can you tell what days you were

“working on the dump, and what days you were
“working on the ditch?

“A. We did work on the ditch—it would have
“a break-out and we would have to go up and fix
“it; then we would sluice again.

“Q. About how much time would you be working
“on the ditch, can you tell?

“A. That is pretty hard to tell how much time
“I did put in on the ditch exactly.

“Q. Can you tell approximately how much time;
“give the Court any idea of how many days?

“Q. (By THE COURT.) Did you work one day on
“the ditch?

“A. Yes, I have been working one day on the
“ditch.

“Q. Two days?

“A. I worked about five or six days I guess.

“Q. How many days did you go up there?
“Was it just five or six times?

“A. I was up and around there—

“Q. About how many times did you go up there
“to do the five or six days’ work on the ditch?
“Did you go up and work an hour or two at a time,
“or did you put in an entire day?

“A. I was working there an entire day too some-
“times.” (Tr. 67.)

Knute Peterson, also, makes use of the same allegations in his claim of lien as to the character of his work, but his testimony does not agree with this at all, as will be seen from the following:

“Q. You say here that you performed work and
“labor from the 29 day of April and ceased said
“work and labor on the 3d day of June, 1911. Is
“that right?

“A. Yes.

“Q. What rate of wages was you to receive?

“A. Five dollars a day.

“Q. Who hired you to go to work?

“A. Gust Honk.

“Q. In what capacity was he working there?

“A. He was foreman, and I asked him for a job, and he told me Ed Jern was the layman.

“Q. What work were you doing there?

“A. I was shoveling in all the time, and fixing up the ditch once in a while.

“Q. Can you tell the Court how much time you worked at the different jobs you were doing; can you segregate your time?

“A. I put in about four days all told on the ditch during that time, and the rest of the time I was shoveling in the dump all the time into the boxes.

“Q. You put in four days’ labor on the ditch?

“A. Yes, sir.

“Q. That was the only extra work you did aside from shoveling in? A. Yes.” (Tr. 77.)

Carl Strass, the last of the claimants, also used the same language in describing his work, in his claim of lien, but he testifies of entirely different work.

“Q. Now, Mr. Strass, what work were you doing on the claim?

“A. Well, I was working in the dump part of the time and part of the time on the ditch.

“Q. How much of the time were you working on the ditch? Can you segregate your time?

“A. I didn’t keep track of the different places.

“Q. Can you tell now approximately how much time you put in working on the ditch?

“A. I think I put in about seven days on the ditch all told.

“Q. Seven days on the ditch? A. About.

“Q. You didn’t keep track, you say?

“A. No. I didn’t keep track of the time I put
“in on the ditch or on the dump either.

“Q. Was there any other work you did there
“besides shoveling in and working on the ditch?

“A. Oh, yes. We had to shift the boxes occa-
“sionally. The center of the dump was worked out,
“and we had to shift the boxes to the sides a cou-
“ple or three times while I was there.

“Q. Did you do any work cribbing or anything
“of that kind? A. No, sir.” (Tr. 81.)

It cannot be disputed that each claimant testified to having rendered services of an entirely different kind than that set out in the liens and the complaint. Nowhere is there any testimony of the *digging of tunnels, running cross-cuts, drifting out, excavating and hoisting gold-bearing gravels, building flumes and ditches, and timbering shafts.*

The only testimony approaching this is that several of the men worked on the ditch, but this was not *building flumes and ditches*, on the contrary, it was repairing an already existing ditch, a ditch which, according to the evidence, had been in existence for more than two years before this time. (Tr. 85, 94, 116.) The evidence as to the work on the ditch also shows that it was not an extension of the ditch, but merely keeping it up to the standard of efficiency and repair necessary for its use in the ordinary operations of the placer claim. Honk, the foreman, testified as follows:

“Q. Tell the Court about that ditch, and why it
“was necessary to do so much work there.

“A. Yes. The creek was nothing but glacier
“mud and glacier sand. And in the spring when it
“began to thaw out, especially when there was a

“lot of water like that, it would wash out right
 “along. And we had to get two or three wheelbar-
 “rows and wheel steadily from old tailing piles
 “that were on Number 3 for over two days steady
 “into the bottom of the ditch just in one stretch.
 “Then most of the time my own work was on the
 “ditch pretty near most of the time because she was
 “breaking out constantly all along the ditch.” (Tr.
 84.)

Appellee may contend that the allegation “*building flumes and ditches*” covers this, but such is not the case. The ordinary accepted meaning of “build” is to construct a new piece of work, to bring into existence something that is not yet in existence, not to repair or alter something already existing. This is the same construction as placed upon it by the Courts.

“ ‘Build’ as used in Pub. St. C. 34 P. 5, providing that towns may appropriate money for building bridges, means to construct anew, and repairing is not building within the statute.”

State vs. White, 18 Atl. 179; 16 R. I. 591.

“ ‘Build’ as used in Olympia City Charter, P. 3, subd. 25, requiring as a preliminary to the building of sidewalks and assessing and levying taxes therefor, that a petition by the majority of the property owners or a vote of two-thirds of the Common Council in favor be had, means ‘constructed’ or ‘erected’ and is, therefore, not synonymous with ‘repairs’ or ‘repaired,’ and hence the city was not released from its obligations to repair by failure to procure a vote under the Charter.”

Hutchinson vs. City of Olympia, 5 Pac. 606; 2 Wash. T. 314.

This may be rather a fine-spun distinction and perhaps not a fatal variance, but it is the straw which shows the direction of the wind.

It certainly is true that there is a serious variance

between the description of the entire work done, as alleged in the claims of lien and the complaint, and the proofs offered.

Is this variance fatal? The claim of lien is intended to give notice to the owner of the work done, the amount claimed and of the property sought to be charged.

“The purpose of the record and statement must be to inform the owner, * * * as to the extent and nature of a lienor’s claim, to facilitate investigation as to its merits * * * . In all essential particulars it must be true.”

Wagner vs. Hansen, 103 Cal. 104, 107.

The uniform rule in all jurisdictions is that a failure to make a correct and true statement of the demand destroys the lien. (*Russell vs. Hayner*, 130 Fed. 190.)

In the case of *Wagner vs. Hansen*, cited *supra*, the evidence showed that no agreed price had been made for the work. The lien and complaint charged an agreed price. The Court held that the same constituted a fatal variance.

In the case of *Jones vs. Shuey*, 40 Pac. 17, the same facts exist, the lien and complaint alleging an agreed price of \$3.50 per day, the evidence showing an implied contract as to the amount of wages. The Court held the variance so fatal as to preclude a foreclosure.

In *Palmer vs. Lavigne*, 104 Cal. 30, the lien charged a contract with one person, the wife, while the evidence showed it made with the wife and husband. The Court held this a fatal variance.

In *Breed vs. Glasgow Inv. Co.*, 92 Fed. 760, the lien made the following statement: “To labor performed and materials furnished in the construction of a new hotel at Natural Bridge, Va., and labor performed and materials furnished in repairing and improving the

building known as Appledore Hotel, as per contract, \$12,000." The evidence showed that the contract was for \$17,945.42, on which there was a balance of \$12,000.00 due. The Court held this a variance fatal to the lien.

Appellants' position is that the character of the labor set out in the liens and complaints is utterly different than that which was proved to have been done, so different that no stretch of construction can make the allegation conform to the proofs. Such being the case, the liens must be void in toto.

WORK PERFORMED WAS ORDINARY PLACER OPERATION.

Viewing the evidence in an impartial light, we must reach the conclusion that the work performed was such as is incident to the ordinary operation of a placer mining claim. Thawing, sluicing and washing the dump, work which must be and is performed in every placer claim in order that the profits of the claim may be realized. Surely this cannot be considered as developing and improving the claim. Repairing the ditch when it breaks out, repair work, not construction work. It was merely maintaining the standard of efficiency.

For this class of work the laws of Alaska do not give any lien. Only work that is an improvement or a development of the claim can carry a lien with it. This was decided by this Court in the case of *Pioneer Mining Co. vs. Delamotte et al.*, 185 Fed. Rep. 752.

LUMPING OF LIENABLE AND NON-LIENABLE MATTER DESTROYS LIEN.

This leads to the next consideration of whether or

not a lien should be allowed for the time spent in repairing the ditch.

As stated above, this Court has held that only improvements or development work is lienable under the Alaska Code. We will offer no further argument on this proposition, except to say that if allowed by the statute and if the variances between the proofs and the liens be not fatal, nevertheless the liens are void in toto, because they lumped non-lienable and lienable matter under one general charge in both the complaint and in the liens.

It does not appear from the face of the liens or from any allegations in the complaint as to how much time was spent in working on the ditch, and at the very best the evidence offered on that point is fragmentary and conjectural. (See evidence set out *supra*.)

Such a lumping of non-lienable and lienable charges under one general demand destroys the lien in toto, according to the almost universal holdings of the Courts.

“It is well settled that a lien account which so mingles items for which the law gives no lien with those for which a lien may be had that they cannot be separated upon a mere inspection is void. In *Baker vs. Fessenden*, 71 Me. 292, the Court says:

“‘Thus, if the plaintiff might legally have had a lien for a portion of his labor, he has so intermixed and interwoven it with that for which he has shown none that it is utterly impossible for the Court, and probably for the parties, to make any such distinction between the two kinds as to authorize a lien judgment for any definite amount.’ In *Edgar vs. Salisbury*, 17 Mo. 271, it is decided: ‘Where, in a demand filed by a person seeking to avail himself of the benefit of the act concerning mechanics’ liens, services for which he might have a lien are combined with other charges, for which

no lien is given, and the whole summed up in one item, so that it is impossible to ascertain from the account filed how much of the gross charge is a lien, the party will lose the whole benefit of the act.' In *Nelson vs. Withrow*, 14 Mo. App. 270, it is declared that 'an account filed as the foundation of a mechanic's lien, which contains a lumping charge, including an item for which no lien is given, will not support a lien.' Says Thompson, J.: 'The reason of this ruling is that the owner of the building has the right to know, from the account filed, the amount which, under the law, has become a charge upon the property, in order that by paying or tendering this amount he may discharge the property of the incumbrance.' In *Mining Co. vs. Smith*, 1 Or. 171, it is declared that 'claims for anything but labor and materials are evidently non-lienable, and cannot, therefore, be embraced in a judgment for a lien.' In *Adler vs. Exposition Co.* (Ill. Sup.), 18 N. E. 811, Craig, C. J., states: 'The entire sum named—the \$5,000—is to be paid for the entire amount of labor to be performed under the contract. The result is, as an entire contract, it cannot be enforced in this proceeding, for the reason that no lien is given for a part of the labor to be performed under the contract. On the other hand, the contract cannot be enforced as to that part of the labor performed for which a 'lien is conferred by the statute, because the contract is entire, and an entire contract cannot be apportioned, and the performance of it enforced in fragments.' *Crosby vs. Loop*, 14 Ill. 330. That the superintendence of the mill and boarding house was part of the consideration for the \$250 promised the plaintiff in error for his services is forcibly indicated by the admission, sworn to by him, that his salary was increased after the said establishments were put in operation. For additional responsibility, and enlarged demands upon his time and skill, it was legitimate that he should require an advance in his allowance. It is not without sig-

nificance that the plaintiff failed to specify in his 'lien claim' the services performed under the provision for 'such other services as were usual and customary to be done by mining superintendents;' but it is immaterial whether the omission proceeded from an appreciation of the consequence of such detail, or from inability to make an apportionment. The claim is for a fixed sum for all his services and, being in part, at least, for such as are not within the scope of the statute, is void in toto. *Boyle vs. Mountain Key Min. Co.*, 50 Pac. 352.

"An account containing a lumping charge, in which is mingled an item for which no lien is given, will not support a lien; and the defect cannot be cured by oral evidence, by means of which the items for which a lien is given may be separated from those for which a lien is not given. 2 *Jones, Liens*, Sect. 1419. In *Dalles Lumber & Manuf'g Co. vs. Wasco Woolen Manuf'g Co.*, 3 Or. 527, it was held that a corporation incorporated for the purpose of manufacturing and selling lumber could not acquire a lien for labor, and that, having joined in a lumping charge, a claim for labor with that for material, no lien was thereby created. So, in *Kezartee vs. Marks*, 15 Or. 529, 16 Pac. 407, it was also held that a lumping charge for material furnished and used in the construction of a dwelling house and fence did not create a lien upon the house when that alone was sought to be charged by the lien. Following the rule established by these decisions, we hold that the claim for building the wagon road cannot be joined in a lumping charge with one for digging a ditch or running a tunnel, and, the claimant having joined them in his notice, no lien attached to the premises by reason thereof. Many other objections are made to the sufficiency of the notice, which we do not deem necessary to consider. It follows from the foregoing that the decree must be affirmed, and it is so ordered."

Williams vs. Toledo Coal Co., 24 Ore. 426; 31 Pac. 159.

To the same effect are the following cases:

Cannon vs. Williams, 14 Colo. 21; 23 Pac. 456;

Perkins vs. Wilson, 40 Atl. 950;

Kendall vs. Fader, 199 Ill. 294; 65 N. E. 318;

Peatman vs. Centerville Light, Heat & P. Co.,
105 Iowa 1;

Kelley vs. Kelley, 77 Me. 135.

This doctrine has even been extended in the case of *Murphy vs. Gusti*, 22 R. I. 588; 48 Atl. 944, in which case a lien for labor and materials having been lumped in one charge, and the right to a lien for the labor having been lost by lapse of time, the entire lien was held void.

CLAIMANT LIMITED TO TIME EMBRACED IN LIEN.

The lien claim filed by Victor Anderson is open to still further serious objection. He states in his claim of lien that he was unpaid for 21 days' time between the 1st of May and the 26th of June (Tr. 237). In testifying, he stated that he did 21 days' labor between May 1st and June 1st.

"Q. Tell the Court what days you worked in May.

"A. I worked the 1st, and the 2d, 3d, 4th, 5th, "6th, 7th and 8th. Then, I worked 8 hours on the "9th, and 2 hours on the 10th. And I worked the "18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th; on the "26th I had 5 hours, and on the 29th 5 hours. On "the 30th a full day and the 31st." (Tr. 66.)

It is apparent from the testimony that Anderson worked but 17 days and 5 hours between the 1st of May and the 26th of May. That being the case, he could only recover for the days he worked during the period embraced in his lien claim.

Goss vs. Streletz, 54 Cal. 640;

Santa Monica L. & M. Co. vs. Hege, 48 Pac. 69.

LIEN MUST STATE AMOUNT OF CLAIM.

The lien claim of Knute Peterson (Tr. 25) is totally void, as it fails to comply with the statute in this, that no statement of his demand is given. We give the wording of his claim as it appears in the transcript:

“ * * * consisted of 29½ days' work and labor at the agreed price of \$5.00 per day and board amounting to the sum of \$145.50; that no part of said sum has been paid, except \$. on account thereof, and there remains due claimant for said work and labor the sum of \$., after deducting all just credits and offsets.”

As has been set out hereinbefore, the purpose of the notice of the claim of lien is to give the owner information as to what was done, when, where, for whom and how much is claimed therefor. Conceding that everything save the amount claimed has been stated, yet the most pithy thing, the subject in which the owner must perforce be most vitally interested, has been left unstated.

A miner's lien creates a preference where otherwise no preference is given by general statute and to set into operation the statute in his favor, the claimant must substantially comply with the same.

This cannot be a substantial compliance with the statute as there is no statement in the lien of his demand. There is nothing whatever to show the owners whether Peterson had a claim for \$145.50 (which is in fact what he claimed at the time of trial) or whether he had any claim whatsoever.

A lien must be perfected before the foreclosure suit be commenced. No amendment of the same made after the statutory period for filing the same has expired,

can cure any of the defects therein, nor can resort be had to parol evidence to cure such defects.

All testimony offered by Peterson as to the amount of his claim should have been excluded as he had no claim, and for the further reason that he had made no claim.

It cannot be contended that the lien claim was sufficient to put the owners on their guard. Such false reasoning is quickly overthrown by the case of *Liberty Perpetual Building and Loan Co. vs. M. A. Furbish & Son Mach. Co.*, 80 Fed. 631, in which the Court says:

“The suggestion that the record, as it was made in the clerk’s office, was sufficient to put any one who examined it on his guard, and that it was such notice as would induce a prudent business man to make full inquiry, is, we think, without force. No one is required to go outside of the clerk’s office for the information he is told by the law he can find therein.”

INSUFFICIENCY OF EVIDENCE TO SUSTAIN FINDINGS.

Appellants respectfully submit that the evidence was entirely insufficient to justify and sustain the finding of the Court that the owners failed to give notice that they would not be responsible for the work and labor done upon said premises by posting and keeping posted a notice in writing to that effect in a conspicuous place upon the said mining claim and premises or upon any building or other improvement situate thereon.

There is no conflict to the testimony of the defendants and their witnesses concerning the postings which they made.

Upon direct examination, Carl G. Erickson, a witness for the defendants, testified as follows:

“Q. State to the Court what you did, if anything, in respect to posting notices upon that ground.

“A. I got the two notices from Mr. Noble about the 4th of June, 1910, to post up on the ground in some prominent place or stationary place where it couldn't be moved like on the center post, and I did post one on the center initial post.

“Q. I will ask you if you know what these notices contained? A. Yes.

“Q. What did they contain?

“A. They contained that the claim owners would not consider themselves responsible for any debt contracted or was contracted from this lease on said ground.

“Q. By whom was that notice signed?

“A. By Jesse Noble, Luther Hess and Ben Boone, By Noble.

“Q. By Noble. Was it signed ‘Luther C. Hess?’

“A. ‘Luther C. Hess.’

“Q. Ben Boone? A. Yes.

“Q. By Jesse Noble?

“A. ‘And Jesse Noble. By Jesse Noble.’

“Q. Where did you post this notice?

“A. On the upper initial post on the upper end of the claim, adjoining Number 3 creek claim.

“Q. I will ask you to state whether this was a conspicuous place or in a position where it could be easily seen.

“A. A man working on that claim, walking up and down that ditch could see that notice on the center post, the initial post. The ditch belonged to the claim, and any man working there would be walking up and down there sometime.

“Q. How far from the ditch was that stake?

“A. It could not be but 15 or 20 feet from the ditch.

“Q. What portion of the claim were you working on? A. On the middle part.

“Q. Could you see this upper center stake from where you were working? A. No.

“Q. Why not?

“A. There were obstacles in the road, boiler-houses and some green trees.

“Q. Was there a boiler-house on the ground when you posted the notice?

“A. Yes, there were three boiler-houses on the ground.

“Q. Were they all on Number 2 Above Discovery creek claim? A. Yes.

“Q. You say that Gust Honk was working for you at this time? A. Yes.

“Q. Did you ever talk with him in regard to these notices? A. No.

“Q. You had no conversation with him in regard to them.

“A. No, to nobody. I mentioned it to Ed Jern that I posted it there.

“Q. How far from the boiler-house was this notice?

“A. It would be about seven or eight hundred feet, between seven and eight hundred feet.”

(Tr. 94.)

Upon cross-examination he explains the reason why the posting was made on the lower post, and also the prominence of the same.

“Q. Did you have a boiler-house there?

“A. Yes, sir.

“Q. Why didn't you post that notice at the boiler-house?

“A. It might be torn down at any time—the
“boiler-house, because we were going to move that
“anyway.

“Q. You posted that notice to give the laborers
“notice, didn’t you, and wanted them to see it?

“A. Yes, and they could see it if they wanted
“to at that time. In walking up and down the
“ditch they couldn’t help but see it.

“Q. You posted that on a post at the lower
“end of the claim? A. At the upper end of the
“claim.

“Q. Just one notice at the upper end?

“A. Yes, sir, on the initial post on the upper
“end.” (Tr. 97.)

Luther C. Hess, one of the defendants, testified as follows:

“Q. Were you there in the summer of 1910?

“A. Yes. I was there sometime during the
“summer of 1910. I couldn’t tell the date, and
“probably not the month.

“Q. You couldn’t tell the month? A. No.

“Q. What did you do when you went out there?

“A. I had an interest in the property, and I
“went up to see what was being done.

“Q. Did you make an examination of the prop-
“erty in respect to ascertaining whether or not any
“notices were posted?

“A. There was one time I went up there that
“I did.

“Q. Can you tell about what time it was?

“A. I should say it was probably in the fall
“of 1910.

“Q. Was— Who was in possession of the
“ground at that time?

“A. I think Mr. Jern was. I was there sev-

“eral times while Mr. Erickson was there, and
 “then after he disposed of his lease I was there
 “when Mr. Jern was there.

“Q. What did you find, if anything, in regard
 “to notices?

“A. I found the notice posted on the lower cen-
 “ter post, and I may have seen one on the upper,
 “but I don’t remember distinctly about that.

“Q. What did this notice contain that was post-
 “ed on the lower center post?

“A. It was, as I remember it, a written notice
 “prepared by Mr. Noble, setting out that the own-
 “ers would not be liable for work or labor per-
 “formed on the claim. I don’t remember the
 “wording of it.

“Q. You say Mr. Jern was in possession of the
 “ground at this time?

“A. I think he was there. I wouldn’t be posi-
 “tive, but I think he was there. I think it was in
 “the fall after Mr. Erickson had sold out.

“Q. Were these notices posted pursuant to in-
 “structions from you?

“A. I had a talk with Mr. Noble about it, and
 “told him— After I got interested in the prop-
 “erty, I told him that the notices ought to be
 “posted—that would be the only instructions I
 “suppose—and he said he would look after it.

“Q. When were you on the ground after that?

“A. I was not on the ground until the spring
 “of 1911, after that. I went outside that winter,
 “and I wasn’t out there until the spring.

“Q. Did you ever see notices posted on the
 “ground after that? A. I am not certain that I
 “did.

“Q. Do you remember now how this notice was
 “signed?

“A. Well, I believe, if I remember, that my own name and Mr. Boone’s was signed by Mr. Noble. I think it was prepared by Mr. Noble. I know it is not a notice that I prepared myself. It was posted on the lower center post of the claim.” (Tr 103-4.)

Jesse Noble testified with equal clearness that he had seen the Erickson notice and had himself posted and kept posted the required notices.

“THE COURT: Tell what you saw with reference to the notices.

“A. I saw the notice on the upper end, and posted one on the lower end myself.

“Q. (By MR. FRAME.) What time in 1910 did you post this notice?

“A. That must have been along about the first of August, 1910.

“Q. What did this notice state?

“A. It stated practically the same. I couldn’t word it just the words, but anyway, giving notice that the claim owners wouldn’t be responsible for any debts contracted by the laymen.

“Q. Who was in possession of the ground at that time?

“A. Mr. Jern was in possession at that time.

“Q. In August, 1910?

“A. Yes. No, Mr. Jern and Mr. Erickson both were there at that time. They both were working together previous to the time Jern took it over himself.

“Q. You may state what you did with reference to keeping notices posted on the ground.

“A. I kept the notices posted until spring. Then, after Mr. Jern closed down, the notices were still on, and I had some of the other gen-

“tlemen take them in and save them late in the
“fall last year.

“Q. Late in the fall.

“A. Yes, along in September sometime.

“Q. Did you post any notices after you had
“posted these notices in August, 1910?

“A. Yes. The notice on the upper post was re-
“newed once after that. The notice that Mr. Erick-
“son put up was a typewritten notice, and I am
“positive that Mr. Hess—I wouldn’t be real sure,
“but I think Mr. Hess gave it to me to put up.

“Q. I call your attention to this and ask you to
“state to the Court what that is. (Hands paper
“to witness.)

“A. This is a notice I writ out the best I could
“myself and posted it on the lower center post.

“Q. When did you post that notice?

“A. The exact date I wouldn’t be positive of,
“but this notice was posted late in the fall. It was
“the beginning of winter 1910, as near as I remem-
“ber it. The other notice that I had posted was
“destroyed, and I put this one up in the place of
“it. I posted two notices on that post.

“Q. I will ask you if you are able to make out
“the writing on that.

“A. I think I can by studying it a little. It has
“got pretty dim, but I think I can make it out.

“Q. (By MR. ERWIN.) Is that your writing?

“A. Yes, this is my writing.

“MR. FRAME: I offer this in evidence and ask
“that it be marked Exhibit 4. (Paper marked De-
“fendants’ Exhibit 4.)

“Q. State what that notice contains.

“(DEFENDANTS’ EXHIBIT NO. 4.)

“A. (Reading Exhibit 4.) ‘Notice,’ it says on
 “top. ‘To whom it may concern. We, the claim
 “owners, are not responsible for any debts con-
 “tracted or any materials furnished or any wages
 “contracted or materials furnished by laymen or
 “any indebtedness whatsoever. L. C. Hess. Ben
 “Boone. By Jesse Noble, agent.’ ” (Tr. 113-4.)

Charles E. Schon testified that he saw notices. (Tr. 151.)

There is nowhere in the record any evidence that no such posting was made. There is, however, in the records a statement by each lien claimant that he saw no notices, but nothing to show that any of them looked for such notices.

The statute declares that the posting must be in some conspicuous place. Here the record shows that the ditch ran very near to each of the two posts upon which the notices had been placed. The record also shows that the mess house was on another claim so that a posting there would be of no avail. The boiler house was to be torn down in a short while, so that was out of the question. The hoist was not a good place as the men were working with it every day and notices would undoubtedly be torn down almost at once. Where else then could they be posted but on the upper and lower posts?

The fact that the men all testify that they did not see them (though none say that they did look for them), does not of itself show that the notices were not posted and raises no such conflict of evidence of posting so as to sustain the finding of the Court.

We have heretofore set out the testimony as to the character of the work done by the various lien claimants showing the variance between the work done and work charged in the liens to have been done. We wish now to examine the findings made by the Court below as to the character of the work done and to discuss them in the light of the testimony.

A portion of the 3d finding of fact is as follows:

“That said work and labor was done in the construction, development and improvement of said mining premises in sluicing and washing the gold-bearing gravels extracted from the shaft sunk and tunnels run in the development and improvement of said mine.” (Tr. 184.)

The fair construction of the meaning of this finding is that all gold-bearing gravel which was sluiced and washed came from the shaft and tunnels sunk in the virgin soil. But this is directly contrary to the evidence. The Court will recall that the lien claimants testified that most of the dirt on the dump which they sluiced and washed in May, came from the old shaft, the one which had been sunk some two years previous.

Gustafson testified as follows:

“Q. And this dump of dirt that you say you
“were sluicing during the month of May—where
“did that dirt come from — what part of the
“ground?

“A. It both came from the same part, but it
“was two blocks; one block was worked out and
“the other one was opened by sinking a shaft and
“driving tunnels and that was dumped into the
“same dump.” (Tr. 43.)

Gust Honk had been the foreman on the claim and was in a better position to testify as to where the dirt came from than any other person.

“Q. Where did the dirt that was in this dump
“come from, if you know?”

“A. Yes, I know that, when I was underground.

“Q. Where?

“A. The biggest part of it came from the lower
“block that we took out during the winter, and a
“part of it from the shaft we were opening up for
“the summer work.”

Anderson testified as follows:

“Q. (By THE COURT.) Was the dirt all put in
“one place?

“A. Yes.

“Q. How much of it out of one place, and how
“much out of the other?

“A. I don’t know how much it was.

“Q. Half out of one and half out of the other?

“A. No, there was more from one hole. He
“worked one hole out.

“Q. There was more of that than he took out
“early in the winter before he begun driving tun-
“nels?

“A. Oh, yes.

“Q. Much more? A. Yes.” (Tr. 75.)

The same character of finding was used for the other
lien claimants and what we have set out above applies
with equal force to them.

The eighth finding sets out “that said development
and improvement upon said mine and premises en-
hanced and increased the value thereof to the extent of
said work done thereon.”

The only thing to be said about that portion of the
eighth finding is that there is not even a scintilla of
evidence in the record to support it.

The tenth finding sets up that each claimant recorded

a notice and claim of lien containing a true statement of their demands.

We respectfully call the Court's attention again to the variance between the evidence and the liens and to the failure of Peterson to state any demand in his lien.

The second finding of fact has to do with the claim of Victor Anderson and states that between May 1st, 1911, and May 26, 1911, he performed 21 days' labor. This finding, too, is directly contrary to the evidence as his testimony shows.

"Q. Tell the Court what days you worked in May?

"A. I worked the 1st and the 2d, 3d, 4th, 5th, 6th, 7th and 8th. Then I worked 8 hours on the 9th and 2 hours on the 10th. And I worked the 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th. On the 26th I had 5 hours, and on the 29th 5 hours. "On the 30th a full day and the 31st." (Tr. 66.)

Mathematical calculation makes his time 17 days 5 hours between May 1st, 1911, and May 26th, 1911.

The oral opinion of the Court below, made a part of the record at page 224, shows that the Court held the claimants entitled to their liens, not because they did improvement and development work in May, but because they did some such work earlier in the year, work for which they had been entirely paid.

It is apparent that the Court below held the contracts of employment under which the men worked were not severable contracts, but continuing ones. To follow out logically the theory announced by the Court, there would have to be a lien allowed for work done in the ordinary operation of a placer claim, provided the lien claimant had been steadily employed ever since

the development work had been done. Thus a laborer, who many years before had worked in the improvement and development of a claim, and who continued to work upon the claim, though the work for many years had been ordinary placer mining operations, would be entitled to his lien for his last day's labor because his contract was continuing and because he had once done development and improvement work. We submit that such is not and cannot be the law. A contract of labor, unless it is for one entire specified time, is severable even though it be a continuing one. Such has been held to be the case in nearly all jurisdictions.

A severable contract is one the consideration of which is, by its terms, susceptible of apportionment on either side, so as to correspond to the unascertained consideration on the other side, as a contract to pay a person the worth of his services as long as he will do certain work. *Potter vs. Potter*, 43 Ore. 149; 72 Pac. 702; *Telephone Co. vs. Root*, 4 Atl. 829; *Horseman vs. Horseman*, 43 Ore. 83; 72 Pac. 698; *Norrington vs. Wright*, 5 Fed. 771; *Dowley vs. Schiffer*, 13 N. Y. Supp. 552; *Osgood vs. Bauder*, 75 Iowa 550; 39 N. W. 887; 1 L. A. 655.

Briefly to recapitulate, we submit that the decree should be reversed for the following reasons:

- (a) Fatal variances between the proofs and the complaint and liens.
- (b) Failure of two lien claimants to file proper liens.
- (c) Evidence shows that no improvement and development work was done within the period embraced in the claims of lien.
- (d) The contracts of labor were severable and hence no lien could attach by reason of previous development work already paid for.

- (e) If any development work was done on the ditch, nevertheless the liens must be void in toto because they lumped lienable and non-lienable claims.
- (f) Work done in ordinary operation of placer claim does not create right of lien.
- (g) Evidence shows that notices of non-liability were posted and kept posted by owners in conspicuous places.
- (h) Insufficiency of the evidence to support findings of trial Court as to character of work done, and to value of alleged improvements.
- (i) That the conclusions of law are erroneous in that they make the sluicing and washing of gold-bearing gravel, work of improvement and development.

Respectfully submitted,

F. J. KIERCE,
WALTER CHRISTIE,
Attorneys for Appellants.

No. 2170

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSIE NOBLE, BEN BOONE, and
LUTHER C. HESS,

Appellants,

VS.

ALGOT GUSTAFSON,

Appellee.

BRIEF FOR APPELLEE.

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Of Counsel.

Filed this.....day of December, 1912.

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FRANK D. MONCKTON, Clerk

DEC 30 1912

By.....Deputy Clerk.

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BRIEF FOR APPELLEE.

The "Statement of Facts" contained in appellant's brief is substantially correct. The first point made by appellants is that there is a fatal variance between the proofs and the statements contained in the claims of lien filed, in this, that the work, as set out in the claims of lien is as follows: "as miner and laborer in digging tunnel, running cross-cuts, drifting-out, excavating, and hoisting gold bearing gravels, building flumes and ditches, and timbering shafts, in the improvement, opening, developing, and working the same"; whereas the work actually performed was, "sluicing the dump" and "repairing the ditch".

Section 262, Chapter 28, Title 3, of the Civil Code of Alaska gives a lien for

“performing labor upon, or furnishing material, of any kind, to be used in the construction, development, alteration, or repair, either in whole or in part, of any mine, etc.,”

and Section 266 provides that it shall be the duty of a person claiming a lien

“to file with the recorder, a claim containing a true statement of the demand, after deducting all just credits and off-sets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the material, and also a description of the property to be charged with the lien, sufficient for identification; which claim shall be verified by the oath of himself or of some other person having knowledge of the facts.”

It will be observed that the statute does not anywhere require a statement of the exact character of the work performed; and we submit, that if the words, “in digging tunnel, running cross-cuts, drifting-out, excavating, and hoisting, gold bearing gravels, building flumes and ditches and timbering shafts”, had been entirely left out of the claim of lien, the claim would have been sufficient. The statute gives a lien for “performing work in the construction, etc.” This would have been a substantial compliance with the terms of the statute, which is all that the law requires.

Can it be said that if a claimant performs a particular duty, out of an infinite variety that might

be performed in and about the mine, then omits to state specifically the nature of that particular duty in his claim, that his lien will be defeated? And must he be limited to the particular acts enumerated in his claim of lien, although he may have performed other acts which are lienable also? We have not been referred to any decision holding such to be the law.

Wood v. Wrede, 46 Cal. 637, says:

“A substantial observance of the provisions of the statute is all that is necessary, and a lien will not be defeated by nice criticism of the language in which the claim is set forth.”

Malone v. Big Flat Gravel Co. et al., 18 Pac. Rep. 772, states:

“We do not deem it incumbent upon us to go through the mass of small details collected by counsel for appellants. It is sufficient to say that the character of the work should not be scrutinized too strictly. If the labor had a legitimate connection with the working of the mine, it is sufficient within the meaning of the lien law.”

A substantial statement of the facts required by the statute is sufficient.

Castagnetto v. Coppertown M. & S. Co., 80 Pac. 74;

Hagman v. Williams, 25 Pac. 1111.

Ascha v. Fitch, 46 Pac. Rep. 298, uses the following language:

“It is true that a mechanic’s lien is purely a statutory creation, and that he who would avail

himself of its benefits must show a substantial compliance with the terms of the statute. It by no means follows, however, that courts should give to the statute a construction tending, by its technicality, to fritter away, impair or destroy the benign objects aimed at in its adoption. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. But we are not called upon to hold the claimant to a rigid technicality as to the manner of performance; and when it appears that the precise words of the statute had not been used by the claimant, but that other and substantially equivalent expressions have been resorted to, it will be deemed a sufficient compliance with the requirements of the law."

McGinty v. Morgan, 54 Pac. Rep. 392, states the following:—

"The provision of Section 1187, Code Civ. Proc. (Cal.) that the notice of lien 'shall contain a statement of the terms, time given, and conditions of the contract' is not to be construed as requiring a statement of all the details of the contract, but is to receive a reasonable construction, in view of the purpose for which it is manifestly required."

Upon reading the cases cited by appellant in this connection, it will be found that there was either a want of a "substantial compliance with the terms of the statute", or the variance between the proofs and the statement contained in the claim of lien was so great as to preclude the claimants from recovering.

In *Russell v. Hayner*, 130 Fed. 90, cited by appellant, the claim did not state the name of the owner, the reputed owner, nor that the owner was unknown; something that was specifically required by the statute.

In each of the cases of *Wagner v. Hansen*, 130 Cal. 104, and *Jones v. Shuey*, 40 Pac. 17, the action was based upon an express contract, whereas the evidence showed an implied contract, and, of course, in such a case, the variance would be fatal.

In *Palmer v. Lavigne*, 104 Cal. 30, the action named the wrong party, and, of course, in that case the plaintiff could not recover.

In *Breed v. Glasgow Inv. Co.*, 92 Fed. 760, the evidence showed a different contract from the one alleged, and, of course, plaintiff was there precluded from recovering.

These were all things which the statute specifically required to be stated, and which were not substantiated by the evidence produced. In the case at bar, the particular character of the work was not required to be stated, except in so far as it went to show that it was done in the improvement, development, opening up, etc., of the mine.

WAS THE WORK LIENABLE?

The next point made in appellant's brief is, that work of the character of that done in the case at bar is not development or improvement work, and,

therefore not lienable; and in support of that contention, the case of *Pioneer Mining Co. v. Delamotte et al.*, 185 Fed. Rep. 752, is cited.

It would seem that the question as to what constitutes development work or improvement work upon a mine is one of fact rather than one of law, to be found by the court upon competent testimony. The court cannot be presumed to be an expert upon mines, nor to know what may or may not constitute development work. The court below, upon the testimony adduced, found the fact to be, that the work performed by the lien claimants here, was, development work, and therefore lienable, and, unless it is shown that there is a want of evidence to support it, the finding must remain undisturbed.

Assuming, however, that this is a question of law for the determination of the court, we submit that there is nothing in the *Pioneer Mining* case, *supra*, which supports the contention of appellant that this class of work is not lienable. That case uses the following language:—

“The allegations of the complaints in regard to the work done upon the claim and the character thereof, were put in issue by the answer. Upon the trial no proof was offered to sustain any of these allegations. The notices of lien were offered and admitted in evidence, and seem to have been accepted by the defendants in the action as *prima facie* proof of the allegations of the complaint. In every such case, the burden of the proof is on the lien claimant to show by legally sufficient evidence the accrual of the lien under the terms of the statute

which creates it, as well as under the terms of the contract under which the work was done.
 * * * For the error of enforcing the lien upon the evidence submitted, and over the denials of the appellant's answer, the decree must be reversed."

From the above, it can be readily seen that the reason for denying the liens in the case cited was not the one advanced by appellant.

There is a case, however, holding that this character of work is lienable, viz., the case of *Cascaden v. Wimbish*, 161 Fed. 241-246, which uses the following language:—

"Without merit, also, is the contention that the lien claimants should have no lien for the time and labor devoted to cleaning up and washing the gold taken out of the mine. *This was labor done upon the mine within the meaning of section 262.*"

AS TO LUMPING LIENABLE AND NON-LIENABLE MATTER.

If what we have stated above is true, and we maintain that it is, then appellants' next contention must fall, because there can be no question of lumping lienable and non-lienable matter, the work being all lienable.

AS TO KNUTE PETERSON'S CLAIM.

It seems that the claim of lien of Knute Peterson with reference to the amount demanded was worded as follows:—

“* * * consisting of 291½ days’ work and labor at the agreed price of \$5.00 per day and board, amounting to the sum of \$145.50; that no part of said claim has been paid, except \$..... on account thereof, and there remains due claimant for said work and labor the sum of \$..... after deducting all just credits and offsets.”

Counsel for appellant, in referring to this statement in the lien, used the following language:—

“The lien claim of Knute Peterson is totally void, as it fails to comply with the statute in this, that no statement of his demand is given.”

We think that when Peterson stated that his work

“consisted of 291½ days’ work and labor at the agreed price of \$5.00 per day and board, amounting to the sum of \$145.50; that no part of said claim has been paid, except \$..... on account thereof”,

he made a very clear “statement of his demand”. The amount which he earned is clearly set forth, the character of the contract is clearly set forth, and the fact that nothing was paid on it was also set forth. Because the claimant did not state a mere conclusion, to-wit: that there was a certain amount due him, is no reason why his lien should be defeated. We believe that there was a substantial compliance with the statute.

AS TO POSTING OF THE NOTICES OF NON-LIABILITY.

The law of Alaska requires that, in order to exempt the owner from liability, the notices must be posted in a conspicuous place. It was incumbent upon defendants to show, not only that the notice was posted, but that the place where it was posted was a conspicuous one. Upon all the evidence produced in the case, the court found that even were it admitted that the notices were posted, they were not posted in a conspicuous place as contemplated by the statute.

The question as to what constitutes a conspicuous place is, of course, one of fact; and unless there is a total want of evidence to sustain the court's finding, it must remain undisturbed. The exact location of the notices was brought out in the evidence, and, we believe, that, having regard to the contour, topography, etc., of the land in that place, the court could determine upon that evidence alone, whether or not the place was conspicuous. But what could be better proof of the fact that the place was not a conspicuous one than the fact that the men who were working there for many days, and who would be the ones most likely to see such a notice, and who would be the ones most interested, never did see any such notices. That is the testimony of all of the lien claimants.

The oral opinion of the Honorable Judge of the court below, contained in pages 224 to 231 of the transcript, sets forth very clearly the reasons for

his decision, and we are willing to adopt his language as our own.

In conclusion, we submit that appellants have failed to show any reason why the judgment should be reversed, and that the decision of the lower court should be upheld.

Respectfully submitted,

T. C. WEST,

F. DE JOURNAL,

Attorneys for Appellee.

JOSEPH T. CURLEY,

Of Counsel.

No. 2173

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA FISHERMEN'S PACKING COMPANY,
a Corporation,
Plaintiff in Error,

VS.

CHIN QUONG,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

FILED

SEP 6 - 1912

No. 2173

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Circuit Court of Appeals
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ALASKA FISHERMEN'S PACKING COMPANY,
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Transcript of Record.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

No. 32,638—Dept. No. 5.

**ACTION ON CONTRACT FOR RECOVERY OF
MONEY.**

CHIN QUONG,

Plaintiff,

vs.

**ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,**

Defendant.

Complaint.

Now comes the plaintiff in the above-entitled action, and for cause of action against the above-named defendant alleges:

I.

1. That the said defendant, Alaska Fishermen's Packing Company, was at all the dates and times, hereinafter mentioned, and now is, a corporation duly incorporated, organized and created under and by virtue of the laws of the State of Oregon.

2. That heretofore, to wit, and on or about the twentieth day of November, A. D. 1909, the said plaintiff and the said defendant made and entered into that certain agreement in writing, a copy of which said agreement is hereunto attached, marked Exhibit "A" and made part of this complaint.

3. That said plaintiff has duly performed all of the covenants, stipulations and conditions of said agreement on his part to be performed.

4. That said defendant paid to said plaintiff as and for advance payments on account of said agreement, as required by the terms of said agreement, in two several equal payments, the sum of Fourteen Thousand (\$14,000.00) Dollars, being the sum of One Hundred [1*] (100.00) Dollars for each man furnished by said plaintiff under said agreement.

5. That all cans of salmon packed under said agreement were filled by Jensen can-filling machines, and that the pack of salmon at said cannery, during the said season of 1910, was less than sixty-six thousand (66,000) cases.

6. That there was due and payable under the terms of said agreement by said defendant, upon the full performance thereof by said plaintiff, the sum of Thirty-six Thousand Three Hundred (\$36,300.00) Dollars, of which sum said defendant has paid to said plaintiff the sum of Fourteen Thousand (\$14,000.00) Dollars as aforesaid.

7. That defendant has laid out and expended, at the request of said plaintiff, and for and on his behalf, the sum of Twelve Hundred and Eighty-three and 30/100 (\$1,283.30) Dollars, and is entitled to a further credit, upon the said agreement, and upon the amount due by the said defendant thereunder, in the sum of Two Thousand Four Hundred and Forty-eight (\$2,448.00) Dollars, for and on account of an excess of do-overs under said agreement, leaving a balance due under said agreement of the sum Eighteen Thousand Five Hundred Sixty-eight and 70/100 (\$18,568.70) Dollars, payable by said defend-

*Page-number appearing at foot of page of original certified Record.

ant, under the terms of said agreement to the Quong Kee Company.

8. That Chin Quong, Chin Bing, Chin Hing, Chin Yoke and Chin Bin, were at all the dates and times herein mentioned, and now are, copartners engaged in business in the City and County of San Francisco, State of California, under the firm name and style of Quong Kee Company.

9. That heretofore, to wit, and on or about the 12th day of November, 1910, the said copartnership, Quong Kee Company (which said Quong Kee Company is the Quong Kee Company mentioned in the said agreement), assigned, transferred and set over all of the right, title and interest in and to the said agreement, and to all money due or to grow due thereon, to the plaintiff herein. [2]

10. That said defendant has not paid the sum of Eighteen Thousand Five Hundred and Sixty-eight and 70/100 (\$18,568.70) Dollars and the same is wholly unpaid.

And for a second cause of action against said defendant plaintiff alleges:

II.

1. That the said defendant, Alaska Fishermen's Packing Company, was at all the dates and times hereinafter mentioned, and now is, a corporation duly incorporated, organized and created under and by virtue of the laws of the State of Oregon.

2. That said defendant is indebted to said plaintiff in the sum of One Thousand Six Hundred and Seventy-one and 40/100 (\$1,671.40) Dollars, on account of work, labor and services heretofore and

within two years last past, done and performed for the said defendant by said plaintiff, at the special instance and request of said defendant in assembling and nailing up twenty-six thousand (26,000) box shook, and for moneys paid and expended by said plaintiff for said defendant, at its special instance and request.

3. That no part of said sum has been paid by said defendant, and the said defendant has not paid the same or any part thereof.

And for a third and separate cause of action against said defendant plaintiff alleges:

III.

1. That said defendant, Alaska Fishermen's Packing Company, was at all the dates and times hereinafter mentioned, and now is, a corporation duly incorporated, organized and created under and by virtue of the laws of the State of Oregon.

2. That said defendant is indebted to said plaintiff in the sum of Eighteen Thousand Five Hundred and Sixty-eight and 70/100 (\$18,568.70) Dollars, on account of work, labor and services heretofore and within two years last past done and performed by said plaintiff [3] for said defendant at the special instance and request of said defendant, in furnishing all the skilled and unskilled labor required at the cannery of said defendant, at Nushagak, District of Alaska, for the canning of salmon during the season of 1910, and in receiving, cleaning and preparing the same, making the cans necessary to hold the same, filling the same with fish, wiping, capping, soldering and testing the same, when filled, dotting,

venting and resealing same, cooking, washing, piling, testing, labeling, testing and putting the same in cases, and nailing up the entire pack of said season.

3. That no part of said sum of Eighteen Thousand Five Hundred and Sixty-eight and 70/100 (\$18,568.70) Dollars has been paid, and the defendant has not paid the same or any part thereof.

WHEREFORE said plaintiff prays judgment against the said defendant for the sum of Twenty Thousand Two Hundred and Forty and 10/100 (\$20,240.10) Dollars, together with interest and costs of suit.

JOHN T. THORNTON,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Chin Quong, having been first duly sworn, deposes and says:

That he is the plaintiff in the above and foregoing action; that he has read the foregoing Complaint in the said action, and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

CHIN QUONG.

Subscribed and sworn to before me this 14th day of November, 1910.

[Seal]

THOMAS S. BURNES.

Notary Public in and for the City and County of
San Francisco, State of California. [4]

Exhibit "A" [to Complaint].

"THIS AGREEMENT, made and entered into this 20th day of November, A. D. 1909, by and between CHIN QUONG of the City and County of San Francisco, State of California, party of the first part, and the ALASKA FISHERMEN'S PACKING COMPANY (a corporation), doing business at Astoria, Clatsop County, Oregon, party of the second part.

WITNESSETH, That the said CHIN QUONG for the consideration hereinafter mentioned, agrees to furnish all the skilled and unskilled labor required at the cannery of the party of the second part, located at Nushagak, District of Alaska, for the purpose of canning salmon during the season of 1910, and for that purpose will, when required by the party of the second part (say on or about the 12th day of April, 1910), furnish and place aboard the vessel provided by the party of the second part, at the port of San Francisco, a sufficient force of competent men, say not less than one hundred and forty (140) fifty-seven (57) per cent being Chinese, including three (3) testers to prepare and put up every working day during the term of this agreement all the fish that can reasonably be expected to be had at the cannery, say twenty-seven hundred (2700) cases, or more if possible.

The party of the first part agrees to receive the fish on the wharf at Nushagak, to clean and prepare them in the fish-house for canning (it being under-

stood that the scales are to be removed from the fish), and transport them to the cannery.

The party of the first part further agrees to make all the cans by can seaming machines only, except tin plate that is cut out of square in such shape that it will not make a lock seam but will make a lap seam, and bottoms and tops or what may be required. Said cans to be wiped and capped by machinery; salt filled, solder, bath, wash, pile, label and put in cases and nail up the entire pack of the season; also to put in small piece of tin inside of can on top of fish.

All swelled cans, in excess of four (4) cans per hundred (100), all light cans, all cans collapsed, burst or deficient in seams (where any of said faults or defects are the result of want of skill of the party of the first part), to be paid for by the said party of the first part at the rate of six (6) cents per can.

All leaks to be mended by skilled labor daily by party of the first part, and said mended cans to be accepted or rejected according to the condition of the fish, and if not so mended daily the party of the first part agrees to pay to the party of the second part the sum of three (\$3.00) dollars per case.

All work to be done under the direction and supervision of the superintendent of the cannery and to his entire satisfaction, and to be done with the utmost diligence, speed and care, and in the most complete and workmanlike manner.

And it is further mutually agreed between the parties hereto that the party of the first part is to weigh all the cans after being filled, either by the

filling machine or by hand, before the caps are put on the cans. Any and all trays, tools coolers, tin plates, solder, machinery, or other articles belonging to or under the control of the party of the second part, which may be wasted, destroyed, carried away, or broken by carelessness by the party of the first part, will be charged to and [5] collected from said first party, by deducting from the amount due at the final settlement, at the rate of eight (8) cents for trays, and for other articles at their cost value at the port of San Francisco.

It is especially understood and agreed that the men working under this contract are to perform within reason, all the labor agreed to be done under this contract, and at all times, nights and Sundays not excepted, whenever deemed necessary and so ordered by the superintendent at the cannery; it being understood and agreed that the party of the second part is to furnish all the candles, lamps and coal oil necessary to be used for night work.

In consideration of the covenants and agreements herein agreed to be done and performed by the party of the first part, the said ALASKA FISHERMEN'S PACKING COMPANY agrees to pay the said party of the first part the sum of fifty-five (55) cents for each and every case containing four (4) dozen tall cans of one (1) pound each, when filled by the Jensen can-filling machines and sixty (60) cents per case of four (4) dozen tall cans each, the cans of which are filled by hand, when caused by the failure of the Jensen can-filling machines to work.

The party of the second part agrees to pay one

(1) cook and three testers Fifty (\$50.00) Dollars per month, from the day of sailing from San Francisco, until their arrival in San Francisco, at the season's end, and to some person to be hereafter agreed upon, for his services as Chinese foreman, Seventy-five (\$75.00) Dollars per month.

The party of the second part agrees to furnish free transportation from the port of San Francisco to Nuashagak, District of Alaska, and back again, for all men employed under this contract, and for their provisions and their baggage.

The party of the second part agrees to furnish water, fuel and a habitable house to live in for the use of party of the first part and his employees.

It is especially agreed and understood that the men employed under this contract are not to carry on any trade whatsoever with the Indians, or to sell any liquors to anyone, and that any infraction of this condition of this agreement will be punishable by a fine of Twenty-five (\$25.00) Dollars for each and every offense, and also any man refusing to work without good and sufficient cause for such refusal, shall be liable to a fine of Twenty (\$20.00) Dollars for each and every day lost by reason of such refusal, also shall be liable to a fine of Twenty-five (\$25.00) Dollars for smoking in warehouses and factory bond must be executed by party of the first part to party of the second part, viz., Fifty (\$50.00) at the can-filling and topping machines.

The party of the second part agrees to make to the party of the first part the following advance payments on account of this contract, for which a satis-

Dollars on or about January 30th, 1910, and Fifty (\$50.00) Dollars for each man furnished under this contract, three days (3) after the sailing of the vessel carrying the men, engaged under this contract from the port of San Francisco, State of California.

All payments under this contract to be made to QUONG KEE COMPANY, or to their order.

The party of the first part agrees to forfeit to the party of the second part the sum of Fourteen Thousand (\$14,000.00) Dollars in [6] addition to bond above stipulated, for the failure in executing this contract in the manner and at the time demanded by the requirements of the party of the second part, as in the contract set forth. "The said sum to be paid as liquidated damages, inasmuch as from the nature of the case it would be impracticable to fix the actual damage."

It is further agreed that any outside help necessary to assist the Chinese engaged under this contract are to be paid for by the party of the first part, at the rate said labor is paid for at the cannery at Nushagak, Alaska.

The party of the second part guarantees the pack at this cannery to reach sixty-six thousand (66,000) cases, and hereby agrees, if the amount should be less than that, to pay the party of the first part, the same as if the pack had been that amount. If over sixty-six thousand (66,000) cases, each case to be paid for at the price agreed upon in this contract.

"In the event that the cannery of said party of the second part, or the material necessary for the carrying out of the provisions of this agreement, shall

have been destroyed prior to the arrival of the vessel provided for transporting the laborers furnished under this contract, at the port of destination said party of the second part shall be obliged to return all laborers furnished under this contract to the port of San Francisco, within a reasonable time, free of charge, and no other claim shall be made upon it."

"If in the event of the destruction of said cannery or materials necessary for carrying out the provisions of this agreement, subsequent to the arrival of said vessel, from any cause, before the completion of the pack of the year, said party of the second part shall only pay said party of the first part for such work as shall have been performed prior to such destruction of said cannery, and shall also be obliged to bring back all laborers furnished under this agreement to said port of San Francisco, free of charge."

The party of the first part shall be obliged to lacquer and label say not less than thirty-six hundred (3600) cases per day during the fishing season, and after the close of said season to put on all the labor required to finish the balance of the pack in the shortest possible time.

And it is expressly understood that the party of the first part is to put up not less than twenty-seven hundred (2700) cases of fish per working day, provided they are furnished with the necessary fish for that purpose, by the party of the second part. In default thereof they agree to forfeit to the party of the second part One (\$1.00) Dollar per case.

And it is expressly understood, that the stipulations aforesaid are to apply to and bind the heirs,

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executors, administrators, assigns and successors of the respective parties:

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal and the party of the second part has caused its name to be subscribed and its seal to be affixed the day and year first above written.

CHING QUONG.

[Seal]

ALASKA FISHERMEN'S PACKING COMPANY.

W. F. MCGREGOR, President.

E. P. NOONAN, Secretary.

Signed sealed and delivered in presence of

F. H. HOWARD.

WILFRED FREDERICKSON.

[Seal of Corporation.] [7]

We, the undersigned, sign this agreement as a full guarantee that its terms shall be fully carried out by the party of the first part, holding ourselves liable and bounden to the party of the second part, for any damage they may sustain by reason of failure on the part of the said first party to do and perform all the covenants set forth.

Dated at San Francisco, California, 20th of November, 1909.

QUONG KEE COMPANY,

736 Washington Street,

San Francisco, Cal.

[Endorsed]: Filed November 14, 1910. H. I. Mulcrevy, Clerk. L. J. Welch, Deputy Clerk.

[Endorsed]: Assigned to Department No. 5, Nov. 15, 1910. John J. Van Nostrand, Presiding Judge. [8]

*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY,
a Corporation,

Defendant.

Affidavit for Attachment.

State of California,

City and County of San Francisco,—ss.

Chin Quong, being first duly sworn, deposes and says, that he is the plaintiff in the above-entitled action; that the defendant, Alaska Fishermen's Packing Company, is indebted to the said plaintiff in the sum of Twenty Thousand Two Hundred and Forty and 10/100 (\$20,240.10) Dollars, in lawful money of the United States, over and above all legal setoffs and counterclaims as to the sum of Eighteen Thousand Five Hundred and Sixty-eight and 70/100 (\$18,568.70) Dollars of said indebtedness, upon an express contract, to wit, upon a certain agreement, made and entered into between the said plaintiff and the said defendant, bearing date the 20th day of November, 1909, a copy of which is hereto attached, marked exhibit "A" and made part of this affidavit.

And as to the balance of said indebtedness, to wit, the sum of One Thousand Six Hundred and Seventy-one and 40/100 (\$1,671.40) Dollars, upon an implied contract for and on account of work, labor and services, and for moneys paid and expended by said plaintiff for and on behalf of said defendant, the said [9] work, labor and services, and the said moneys, done, performed, laid out and expended at the special instance and request of the said defendant.

That the said defendant, Alaska Fishermen's Packing Company, is a corporation duly organized, created and existing under and by virtue of the laws of the State of Oregon, and now resides and has for many years last past resided in the said State of Oregon, and is a nonresident of the State of California.

That the said attachment is not sought, and the said action is not prosecuted to hinder, delay or defraud any creditor or creditors of the said defendant.

CHIN QUONG.

Subscribed and sworn to before me, this 14th day of November, A. D. 1910.

[Notarial Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of San Francisco, State of California. [10]

Exhibit "A" [to Affidavit for Attachment].

"THIS AGREEMENT, made and entered into this 20th day of November, A. D. 1909, by and between CHIN QUONG of the City and County of San Francisco, State of California, party of the first part,

and the ALASKA FISHERMEN'S PACKING COMPANY (a corporation) doing business at Astoria, Clatsop County, Oregon, party of the second part.

WITNESSETH, That the said CHIN QUONG for the consideration hereinafter mentioned, agrees to furnish all the skilled and unskilled labor required at the cannery of the party of the second part, located at Nushagak, District of Alaska, for the purpose of canning salmon during the season 1910, and for that purpose will, when required by the party of the second part (say on or about the 12th day of April, 1910), furnish and place aboard the vessel provided by the party of the second part, at the port of San Francisco, a sufficient force of competent men, say not less than one hundred and forty (140) fifty-seven (57) per cent being Chinese, including three (3) testers to prepare and put up every working day during the term of this agreement all the fish that can reasonably be expected to be had at the cannery, say twenty-seven hundred (2700) cases, or more if possible.

The party of the first part agrees to receive the fish on the wharf at Hushagak, to clean and prepare them in the fish-house for canning (it being understood that the scales are to be removed from the fish) and transport them to the cannery.

The party of the first part further agrees to make all the cans by can seaming machines only, except tin plate that is cut out of square in such shape that it will not make a lock seam but will make a lap seam, the bottoms or tops or what may be required.

Said cans to be wiped and capped by machinery; salt filled, solder, bath, wash, pile, label and put in cases and nail up the entire pack of the season; also to put in a small piece of tin inside of can on top of fish.

All swelled cans, in excess of four (4) cans per hundred (100), all light cans, all cans collapsed, burst or deficient in seams (where any of said faults or defects are the result of want of skill of the party of the first part), to be paid for by the said party of the first part at the rate of six (6) cents per can.

All leaks to be mended by skilled labor daily by party of the first part, and said mended cans to be accepted or rejected according to the condition of the fish, and if not so mended daily the party of the first part agrees to pay to the party of the second part the sum of three (\$3.00) dollars per case.

All work to be done under the direction and supervision of the superintendent of the cannery and to his entire satisfaction, and to be done with the utmost diligence, speed and care, and in the most complete and workmanlike manner.

And it is further mutually agreed between the parties hereto that the party of the first part is to weigh all the cans after being filled, either by the filling machine or by hand, before the caps are put on the cans. Any and all trays, tools, coolers, tin plates, solder, machinery, or other articles belonging to or under the control of the party of the second part, which may be wasted, destroyed, carried away, or broken by carelessness by the party of the first part, will [11] be charged to and collected from

said first party, by deducting from the amount due at the final settlement, at the rate of eight (8) cents each for trays, and for other articles at their cost value at the port of San Francisco.

It is especially understood and agreed that the men working under this contract are to perform within reason, all the labor agreed to be done under this contract, and at all times, nights, and Sundays not excepted, whenever deemed necessary and so ordered by the superintendent at the cannery; it being understood and agreed that the party of the second part is to furnish all the candles, lamps and coal oil necessary to be used for night work.

In consideration of the covenants and agreements herein agreed to be done and performed by the party of the first part, the said ALASKA FISHERMEN'S PACKING COMPANY agrees to pay the said party of the first part the sum of fifty-five (55) cents for each and every case containing four (4) dozen tall cans of one (1) pound each, when filled by the Jensen can-filling machines and sixty (60) cents per case of four (4) dozen tall cans each, the cans of which are filled by hand, when caused by the failure of the Jensen can-filling machines to work.

The party of the second part agrees to pay one (1) cook and three testers Fifty (\$50.00) Dollars per month, from the day of sailing from San Francisco, until their arrival in San Francisco, at the season's end, and to some person to be hereafter agreed upon, for his services as Chinese foreman, Seventy-five (\$75.00) Dollars per month.

The party of the second part agrees to furnish

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free transportation from the port of San Francisco to Nushagak, District of Alaska, and back again, for all men employed under this contract, and for their provisions and their baggage.

The party of the second part agrees to furnish water, fuel and habitable house to live in for the use of the party of the first part and his employees.

It is especially understood and agreed that the men employed under this contract are not to carry on any trade whatsoever with the Indians, or sell any liquor to anyone, and that any infraction of this condition of this agreement will be punishable by a fine of Twenty-five (\$25.00) Dollars for each and every offense and also any man refusing to work without good and sufficient cause for such refusal, shall be liable to a fine of Twenty (\$20.00) Dollars for each and every day lost by reason of such refusal, also shall be liable to a fine of Twenty-five (\$25.00) Dollars for smoking in warehouses and at the can-filling and topping machines.

The party of the second part agrees to make to the party of the first part the following advance payment on account of this contract, for which a satisfactory bond must be executed, by party of the first part to the party of the second part, viz., Fifty (\$50.00) Dollars on or about January 30th, 1910, and Fifty (\$50.00) Dollars for each man furnished under this contract, three (3) days after the sailing of the vessel carrying the men, engaged under this contract from the port of San Francisco, State of California.

All payments under this contract to be paid to QUONG KEE COMPANY or their order. [12]

The party of the first part agrees to forfeit to the party of the second part the sum of Fourteen Thousand (\$14,000) Dollars in addition to bond above stipulated, for the failure in executing this contract in the manner and at the time demanded by requirements of party of the second part, as in the contract set forth. "The said sum to be paid as liquidated damages, inasmuch as from the nature of the case it would be impracticable to fix the actual damage."

It is further agreed that any outside help necessary to assist the Chinese engaged under this contract, are to be paid for by the party of the first part, at the rate said labor is paid for at the cannery at Nushagak, Alaska.

The party of the second part guarantees the pack at this cannery to reach *sixty-six* (66,000) cases, and hereby agrees, if the amount should be less than that, to pay the party of the first part, the same as if the pack had been that amount. If over sixty-six (66,000) cases each case to be paid for at the price agreed upon in this contract.

"In the event that the cannery of said party of the second part, or the material necessary for the carrying out of the provisions of this agreement, shall have been destroyed prior to the arrival of the vessel provided for transporting the laborers furnished under this contract, at the port of destination said party of the second part shall be obliged to return all laborers furnished under this contract to the port of San Francisco, within a reasonable time, free of charge, and no other claim shall be made upon it."

“If in the event of the destruction of said cannery or materials necessary for carrying out the provisions of this agreement, subsequent to the arrival of said vessel, from any cause, before the completion of the pack of the year, said party of the second part shall only pay said party of the first part for such work as shall have been performed prior to such destruction of said cannery, and shall also be obliged to bring back all laborers furnished under this agreement to said port of San Francisco, free of charge.”

The party of the first part shall be obliged to lacquer and label, say not less than thirty-six hundred (3600) cases per day during the fishing season, and after the close of said season to put on all the labor required to finish the balance of the pack in the shortest possible time.

And it is expressly understood that the party of the first part is to put up not less than twenty-seven hundred (2700) cases of fish per working day, provided they are furnished with the necessary fish for that purpose, by the party of the second part. In default thereof they agree to forfeit to the party of the second part One (\$1.00) per case.

And it is expressly understood, that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, assigns and successors of the respective parties. [13]

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal and the party of the second part has caused its name to be sub-

scribed and its seal to be affixed the day and year first above written.

CHIN QUONG.

[Seal]

ALASKA FISHERMEN'S PACKING
COMPANY.

W. F. MCGREGOR, President.

E. P. NOONAN, Secretary.

Signed, sealed and delivered in presence of

F. H. HOWARD.

WILFRED FREDERICKSON.

[Seal of Corporation]

We, the undersigned, sign this agreement as a full guarantee that its terms and conditions shall be fully carried out by the party of the first part, holding ourselves liable and bonded to the party of the second part, for any damage they may sustain by reason of failure on the part of the said first party to do and perform all the covenants set forth.

Dated San Francisco, California, 20th of November, 1909.

QUONG KEE COMPANY,

736 Washington Street,

San Francisco, Cal.

[Endorsed]: Filed Nov. 14, 1910. H. I. Mulcrevy,
Clerk. By L. J. Welch, Deputy Clerk. [14]

*In the Superior Court of the City and County of San
Francisco, State of California.*

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY
(a Corporation),

Defendant.

Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the Superior Court of the City and County of San Francisco, State of California, against the above-named defendant upon express contract for the direct payment of money, claiming that there is due to said plaintiff from said defendant the sum of Twenty Thousand Two Hundred Forty and 10/100 (\$20,240.-00) Dollars, besides interest, and is about to apply for an attachment against the property of said defendant as security for the satisfaction of any judgment, that may be recovered therein;

Now, therefore, the undersigned, the Pacific Surety Company, a corporation duly organized and doing business, under and by virtue of the laws of the State of California, and duly licensed for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the State of California, in consideration of the premises, and of the issuing of said attachment, does undertake in the sum of Three Thou-

sand (\$3,000) and no/100 Dollars, U. S. Gold Coin, and promise to the effect, that if the said defendant recovers judgment in said action, the said plaintiff will pay all costs that may be awarded to the said defendant, and all damages which it may sustain by reason of the said attachment, not exceeding the sum of Three Thousand (\$3,000) and no/100 Dollars, and that if the said attachment is discharged on the ground that the plaintiff was not entitled thereto, under section five hundred and thirty-seven (537) Code of Civil Procedure, the plaintiff will pay all damages which the defendant may have sustained by reason of the attachment not exceeding the sum specified in the undertaking.

IN WITNESS WHEREOF the Pacific Surety Company has caused its name to be hereunto subscribed and its seal to be hereunto affixed by its representative thereunto duly authorized, this 11th day of November, A. D. 1910.

PACIFIC SURETY COMPANY.

[Seal]

By JOHN H. ROBERTSON,
Vice-President.

Attest: S. M. PALMER,
Resident Assistant Secretary.

[Endorsed]: Filed Nov. 14, 1910. H. I. Mulcrevy,
Clerk. By L. J. Welch, Deputy Clerk. [15]

SHERIFF'S RETURN.

Sheriff's Office,
County of Alameda.

I, Frank Barnet, Sheriff of the County of Alameda,
do hereby certify that under and by virtue of the

within and hereunto annexed Writ of Attachment, by me received on the 14th day of November, 1910, I did, on the 14th day of November, 1910, attach the following described personal property in the possession of defendant, viz.:

The American barque "W. B. Flint," of the net tonnage of 746 tons, and being the property of the defendant, the Alaska Fisheries Packing Company, and now being in Oakland Creek, Alameda County, State of California.

That I attached said property by taking it into my custody, and placing a keeper in charge thereof.

FRANK BARNET,
Sheriff.

By F. D. Adams,
Deputy Sheriff.

Dated Oakland, November 16th, 1910. [16]

*In the Superior Court of the State of California,
in and for the City and County of San Francisco.*

Department No. —.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY
(a Corporation),

Defendant.

The People of the State of California, to the Sheriff
of the County of Alameda, Greeting:

YOU ARE HEREBY REQUIRED to attach and

safely keep all the property of said defendant within your county, not exempt from execution, or sufficient thereof to satisfy the plaintiff's demand for Twenty Thousand Two Hundred and Forty and 10/100 (\$20,240.10) Dollars, with interests and costs; unless said defendant gives security, by the undertaking of at least two sufficient sureties, in amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Superior Court, at my office in the City and County of San Francisco, this 14th day of November, A. D. 1910.

[Seal]

H. I. MULCREVY,

Clerk.

By L. J. Welch,

Deputy Clerk.

[Endorsed]: Filed Nov. 17, 1910. H. I. Mulcrevy, Clerk. By Milton M. Davis, Deputy Clerk.

[Endorsed]: Sheriff's Office, Received Nov. 14, 1910, at 1-4 P. M. Liber 41, page 93, Oakland, Cal.

[17]

*In the Superior Court of the State of California, in
and for City and County of San Francisco.*

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Affidavit for Publication of Summons.

State of California,
City and County of San Francisco,—ss.

Chin Quong, being first duly sworn, deposes and says: I am the plaintiff in the above-entitled action; the complaint in said action was filed with the clerk of the above-entitled court on the 14th day of November, A. D. 1910, and summons thereupon duly issued. The said action was brought to recover the sum of Twenty Thousand Two Hundred and Forty and 10/100 (\$20,240.10) Dollars, as damages for breach of contract, as appears from the verified complaint of the plaintiff on file herein; that the cause of action is set forth in his said verified complaint on file herein;

That the said defendant, Alaska Fishermen's Packing Company, was at the time of the filing of the said verified complaint herein and now is a foreign corporation duly organized, created and incorporated under and by virtue of the laws of the State of Oregon, and is a necessary party to said ac-

tion; that said defendant has its principal place of business at Astoria, County of Clatsop, State of Oregon; that said defendant resides and has for many years last past resided in the said State of Oregon, and is now and for many years last past has been a nonresident of the State of California: [18] and said defendant has no managing or business agent, cashier or secretary within the State of California.

That this affiant theretofore says that personal service of said summons cannot be made on the said defendant, Alaska Fishermen's Packing Company, and prays for an order that service of the same may be made by publication thereof.

CHIN QUONG.

Subscribed and sworn to before me this 5th day of December, A. D. 1910.

[Seal]

THOMAS BURNES,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 6, 1910. H. I. Mulcrevy,
Clerk. By Wm. J. Egan, Deputy Clerk. [19]

*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Order for Publication of Summons.

Chin Quong, the plaintiff in the above-entitled action, having filed in the above-entitled court, a duly verified complaint against Alaska Fishermen's Packing Company, the defendant above named, and his affidavit for an order for the publication of the summons issued in the above-entitled action;

Now, upon reading said verified complaint and said affidavits of said plaintiff, and it appearing by said affidavit of plaintiff to the satisfaction of this court that the defendant in the above-entitled action, Alaska Fishermen's Packing Company, is a foreign corporation duly incorporated, created and organized under and by virtue of the laws of the State of Oregon, with its principal place of business at Astoria, in the county of Clatsop, in the said State of Oregon; that said defendant corporation resides out of the State of California, and has for many years last past resided outside of the State of California, and that said corporation has no managing or business agent, cashier or secretary within the State of California;

And it further appearing to the satisfaction of this court by the verified complaint of plaintiff on file herein, that a cause of action exists against said defendant, Alaska Fishermen's Packing Company, and that said defendant is a necessary and proper party to said action; [20]

And it further appearing to the satisfaction of this Court by said affidavit of plaintiff that a summons has been duly issued out of the above-entitled court in this action and that personal service of the same

cannot be made upon the said defendant Alaska Fishermen's Packing Company, for the reasons hereinbefore contained, and by said affidavit of said plaintiff made to appear;

ON MOTION of John T. Thornton, attorney for said plaintiff, IT IS ORDERED that the service of the summons in this action be made upon the defendant Alaska Fishermen's Packing Company, by publication thereof in "The Recorder," a newspaper published in the City and County of San Francisco, State of California, here be designated as most likely to give notice to said defendant, the person to be served; that such publication be made once a week for a period of two (2) months.

And it further appearing to the satisfaction of the Court that the residence of said defendant is Astoria, Clatsop County, State of Oregon, IT IS HEREBY ORDERED, that a copy of the summons and a copy of the complaint in this action be forthwith deposited in the United States postoffice, directed to the defendant, Alaska Fishermen's Packing Company, a corporation, the person to be served, at its place of residence, to wit, Astoria, Clatsop County, State of Oregon.

JOHN HUNT,

Judge of the Superior Court of the State of California, in and for the City and County of San Francisco.

Dated December 6th, 1910.

[Endorsed]: Filed Dec. 6, 1910. H. I. Mulcrevy, Clerk. By Wm. J. Eagan, Deputy Clerk. [21]

*In the Superior Court of the State of California, in
and for the City and County of San Fran-
cisco.*

No. 32,638—Dept. No. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY (a Corporation),

Defendant.

Appearance for Defendant.

To Chin Quong, Plaintiff in the Above-entitled
Cause, and to J. T. Thornton, Esq., Attorney for
said Plaintiff:

YOU AND EACH OF YOU ARE HEREBY
NOTIFIED that the defendant in the above-entitled
action hereby appears in the said action by the under-
signed, its attorneys.

Dated January 18th, 1911.

CHICKERING & GREGORY,
Attorneys for Defendant.

[Endorsed]: Due service of the within Appearance and receipt of a copy is hereby admitted this 18th day of January, 1911.

JOHN T. THORNTON,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 18, 1911. H. I. Mulcrevy,
Clerk. By Wm. J. Eagan, Deputy Clerk. [22]

*In the Superior Court of the State of California, in
and for the City and County of San Fran-
cisco.*

No. 32,638—Dept. No. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY (a Corporation),

Defendant.

**Notice of Motion for an Order to Discharge
Attachment.**

To Chin Quong, Plaintiff in the Above-entitled
Cause, and to J. T. Thornton, Esq., Attorney for
said Plaintiff:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE that the Alaska Fishermen's Pack-
ing Company, defendant in said cause, will, on Fri-
day, the 20th day of January, 1911, at the hour of
10 A. M., or as soon thereafter as counsel can be
heard, at the courtroom of the above-entitled court,
at Seventh and Market Streets, San Francisco, move
the said Court for an order discharging the attach-
ment levied by the plaintiff in the above-entitled cause
against the barque "W. B. Flint" with her tackle,
apparel, furniture and personal property in, about
and upon said barque belonging to the defendant, at-
tached by said plaintiff in the above-entitled action;
and to fix the amount of the bond to be filed by de-
fendant herein upon said discharge.

The grounds upon which the said motion will be made are that defendant has appeared herein and desires to discharge the attachment made in the above-entitled cause, on giving due security therefor. [23]

The papers to be used on said motion will be this notice of motion and other papers on file in said cause, and also all papers on file in that certain cause numbered 33,132, now pending in the Superior Court of the State of California in and for the City and County of San Francisco, entitled, "Chin Quong v. Alaska Fishermen's Packing Company, a corporation, Astoria Savings Bank, a corporation, and Frank Barnett, Sheriff of the County of Alameda, Defendants."

Dated January 18, 1911.

CHICKERING & GREGORY,

Attorneys for Defendant.

Good cause appearing therefor, the time within which this notice of motion may be served is hereby shortened to two days, provided said notice is served on the attorney for the plaintiff herein on Wednesday, January 18, 1911.

Dated January 18th, 1911.

JOHN HUNT,

Judge.

[Endorsed]: Filed Jan. 18, 1911. H. I. Mulcrevy, Clerk. By Wm. J. Egan, Deputy Clerk.

[Endorsed]: Due service of the within Notice of Motion and receipt of a copy is hereby admitted this 18th day of January, 1911.

JOHN T. THORNTON,

Attorney for Plaintiff. [24]

*In the Superior Court of the State of California, in
and for the City and County of San Fran-
cisco.*

No. 32,638.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Order Extending Time to Plead to Complaint, etc.

Good cause appearing therefor, it is hereby ordered that defendant, Alaska Fishermen's Packing Company, may have ten days from the date hereof within which to plead to the complaint on file herein, or make such motion as it may be advised.

Dated January 27th, 1911.

JOHN HUNT,

Judge.

Due service of the within Order and receipt of a copy is hereby admitted this 27th day of January, 1911.

Attorney for Plaintiff.

[Endorsed]: Filed Jan. 27, 1911. H. I. Mulcrevy,
Clerk. By Wm. J. Egan, Deputy Clerk. [25]

*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Order Extending Time to Plead or Move.

Good cause appearing therefor, it is hereby ordered that the defendant, Alaska Fishermen's Packing Company, may have ten days from the date hereof within which to plead to the complaint on file herein, or make such motion as it may be advised. Defendant has had two days time and no more.

Dated February 6, 1911.

JOHN HUNT,

Judge.

[Endorsed]: Due service of the within Extension and receipt of copy is hereby admitted this 6th day of Feb., 1911.

JOHN T. THORNTON,

Attorney for Plaintiff.

[Endorsed]: Filed Feb. 6, 1911. H. I. Mulcrevy,
Clerk. By D. J. Sullivan, Deputy Clerk. [26]

*In the Superior Court of the State of California, in
and for the City and County of San Fran-
cisco.*

No. 32,638—Dept. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Order Extending Time to Plead or Move.

Good cause appearing therefor, it is hereby ordered that the defendant, Alaska Fishermen's Packing Company, may have five days from the date hereof within which to plead to the complaint on file herein. Defendant has had twelve days time and no more.

Dated February 8, 1911.

JOHN HUNT,
Judge.

[Endorsed]: Due service of the within Order and receipt of a copy is hereby admitted this 8th day of February, 1911.

JOHN T. THORNTON,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 8, 1911. H. I. Mulcrevy,
Clerk. By Wm. J. Egan, Deputy Clerk. [27]

Surveyor's Report.

Name of Vessel, "W. B. FLINT."

Captain,

Flag American Rig Bark Tonnage,
835 gro. 746 net.

By virtue of appointment and instruction from Superior Judge Hunt, the undersigned Marine Surveyor proceeded to Oakland Estuary and made careful inspection, so far as practicable, of the Bark "W. B. Flint," lying moored in said Estuary, for the purpose of making an appraisement of the value of the bark "W. B. Flint," of her equipment and apparel, and of such personal property as was found on board at the time of the inspection not constituting part of usual ship's equipment and apparel.

After careful inspection the following Report and appraisement is respectfully submitted.

"W. B. FLINT." Bark. Official Number 81094. Built at Bath, Maine, in the year 1885, of 835 gross and 746 net tonnage, now in fair condition, lying moored in Oakland Estuary, together with her usual equipment and apparel, is in my judgment, consideration being given to the depressed state of the shipping market, not worth to exceed seven thousand (\$7,000.00) dollars. Personal property found on board, not belonging to usual equipment of sea-going vessels, was composed of the following items, appraised, in my judgment at the sums set opposite the several items:

62 Iron drums, for distil-		
late	@ \$ 6.00 each	\$372.00
6 Wood fishing boats....		
in fair condition....	@ \$100.— “	600.00
150 (about) Life belts in		
fair condition	@ 40 cents “	60.00
1 lot of old lumber, for		
standees (bunks) ...		50.00
		<hr/>
	Total,	\$1082.00

San Francisco, Feb. 10th, 1911.

L. H. TURNER,
Marine Surveyor.

[Endorsed]: Report of Appraiser. Filed in open court, Feb. 11, 1911. H. I. Mulcrevy, Clerk. By D. J. Creamer, Deputy Clerk. [28]

Minute Order.

CHIN QUONG,

vs.

ALASKA FISHERMEN'S PACKING CO. (a
Corp.).

The deft's motion for an order to discharge the attachment heretofore issued and levied herein upon the bark "W. B. Flint" her tackle, apparel and furniture and the personal property thereon, having heretofore come regularly on to be heard and considered;

It is now ordered, that upon the execution and

filing of an undertaking to be approved by the Court, in the sum of Eight Thousand (8,000) Dollars, said attachment be and the same is hereby released and discharged; and the sheriff is hereby directed to surrender custody and possession of said vessel to the defendant herein. [29]

*In the Superior Court of the State of California,
in and for the City and County of San Francisco.*

No. 32,638.—Dept. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Undertaking.

WHEREAS, the above-entitled plaintiff commenced an action in the Superior Court of the City and County of San Francisco, State of California, against the above-named defendant, claiming that there was due to said plaintiff from the said defendant the sum of Twenty Thousand Two Hundred Forty and 10/100 (20,240.10) Dollars, gold coin of the United States, besides interest, and thereupon an attachment issued against the bark "W. B. Flint," and certain personal property thereon, lying in the Oakland Creek, as security for the satisfaction of any judgment that might be recovered therein, and said bark "W. B. Flint" and personal effects thereon

have been seized by the sheriff of Alameda County under and by virtue of the said writ; and

Whereas, the defendant has appeared in the said action and has applied to the Judge of said Court, upon reasonable and sufficient notice to said plaintiff, for an order to discharge said attachment, and the Judge of said court having fixed the sum for which the undertaking shall be executed at the sum of Eight Thousand (\$8,000.00) Dollars;

NOW, THEREFORE, the undersigned, Pacific Surety Company, a corporation created, organized and existing under and by virtue of [30] the laws of the State of California for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by law, and having a paid-up capital of not less than One Hundred Thousand Dollars, in consideration of the premises and in consideration of the release from attachment of all property attached, as above mentioned, and the discharge of said attachment, does hereby undertake in the sum of Eight Thousand (\$8,000) Dollars, and promise that in case the said plaintiff recover judgment in said action, the said defendant will on demand redeliver such attached property so released, to the proper officer, to be applied to the payment of the judgment, or in default thereof the said defendant and surety will on demand pay to the plaintiff the full value of the property released, not exceeding the amount of such judgment.

IN WITNESS WHEREOF, the undersigned has hereunto set its hand and seal, by its officers there-

unto duly authorized, this 11th day of February, 1911.

PACIFIC SURETY COMPANY.

[Seal] JOHN H. ROBERTSON,
Vice-President and Attorney in Fact.

The above bond is hereby approved.

Dated February 11th, 1911.

JOHN HUNT,
Judge.

Justification of surety waived.

JOHN T. THORNTON,
Atty. for plff.

[Endorsed]: Filed in open court Feb. 11, 1911.
H. I. Mulcrevy, Clerk. By D. J. Creamer, Deputy
Clerk. [31]

Minute Order.

No. 32,638.—Dept. 5.

CHIN QUONG,
vs.

ALASKA FISHERMEN'S PACKING CO., a
Corp.

The defendant's motion for an order to discharge the attachment heretofore issued and levied herein upon the bark "W. B. Flint," her tackle, apparel and furniture and the personal property thereon, having heretofore come regularly on to be heard and considered, and the court having fixed the sum of Eight Thousand (8,000) Dollars as the amount of the understanding to be executed and filed by the defendant, upon the release of said attachment; and

said undertaking having been this day executed, approved and filed;

It is now ordered that said attachment be, and the same is hereby released and discharged, and the sheriff of Alameda County is hereby directed to surrender the custody and possession of said vessel and of all property attached, to the defendant herein.
[32]

*In the Superior Court of the State of California,
in and for the City and County of San Francisco.*

No. 32,638.—Dept. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY (a Corporation),

Defendant.

**Petition for Removal of Cause, on Ground of Diverse
Citizenship, to the United States Circuit Court
in and for the Ninth Circuit, Northern District
of California.**

To the Honorable Superior Court of the State of
California, in and for the City and County of
San Francisco:

Your petitioner, Alaska Fishermen's Packing
Company, a corporation, respectfully shows to this
Honorable Court:

That it is the defendant in the above-entitled
action; that said action has been heretofore brought

in this court against the said Alaska Fishermen's Packing Company by Chin Quong, the plaintiff above-named; that action is of a civil nature; that summons was duly issued in said action by the clerk of said court; that on the 18th day of January, 1911, said defendant appeared in said action in said court; that the time has not yet elapsed within which your petitioner is allowed under the rules of practice and the laws of this State, and the rules of this Court to plead or answer to the Complaint filed herein; that said time to plead or answer to said Complaint will not expire until February 14, 1911, and that your petitioner has not heretofore pleaded or answered in said action. [33]

That the Complaint herein is divided into three causes of action, and plaintiff claims in substance in the first cause of action, that on or about November 20, 1909, plaintiff and defendant entered into a written agreement, a copy of which is attached to the Complaint, wherein plaintiff contracted to furnish all the labor required at defendant's cannery at Nushagak, District of Alaska, for the salmon season of 1910, and to prepare for canning and can the fish received from defendant and handle the entire pack of said season at said cannery; that the plaintiff has performed all the covenants, stipulations and conditions of said agreement; that there is a balance due by the defendant under the terms of said agreement amounting to \$18,568.70, payable by said defendant under the terms of said agreement to the Quong Kee Company; that the Quong Kee Company is a copartnership consisting of Chin Quong, Chin

Bing, Chin Hing, Chin Yoke and Chin Bin; that on or about November 12, 1910, said copartnership assigned and transferred all its right, title and interest in and to the said agreement, and to all money due or to grow due thereon to the plaintiff, and that the defendant has not paid the said sum of \$18,568.70, and the same is wholly unpaid.

In the second cause of action plaintiff claims in substance that the defendant is indebted to the plaintiff in the sum of \$1,671.40 on account of work, labor and service within two years last performed by the plaintiff for the defendant, at its special instance and request, in assembling and nailing up 26,000 box shooks and for moneys paid and expended by the plaintiff for the defendant, at its special instance and request, and that defendant has not paid the same nor any part thereof.

In the third cause of action plaintiff claims in substance that the defendant is indebted to plaintiff in the sum of \$18,568.70 for work, labor and services performed within two years last past, in [34] furnishing labor for defendant's cannery at Nushagak, District of Alaska, for the salmon season of 1910, and in receiving, preparing for canning, canning and handling the entire pack of said season at said cannery, and that the defendant has not paid the said sum or any part thereof.

That your petitioner disputes each and every of said claims and demands, and denies any and all liability therefor; that the matter in dispute in this action exceeds the sum of two thousand dollars, exclusive of interest and costs.

That at the time of the filing of the Complaint herein and at all of the times in the Complaint mentioned plaintiff was and is now a citizen of the Empire of China and was at all said times and is now a resident of the said Northern District of California; that at the time of the filing of the Complaint herein, and at all of the times therein mentioned, Chin Bing, Chin Hing, Chin Yoke and Chin Bin were, and now are, citizens of the Empire of China; that at the time of the filing of the Complaint herein, and at all of the times in said Complaint mentioned, your petitioner was, and is now, a corporation organized and existing under and by virtue of the laws of the State of Oregon and a citizen and resident of said State of Oregon; that the controversy in this action, and every issue of fact and law herein, is wholly between a citizen of the State of Oregon on the one side and a citizen or citizens of the Empire of China on the other.

Your petitioner presents herewith a good and sufficient bond, as provided by the Act of Congress in such cases, that it will, on or before the first day of the next ensuing session of the United States Circuit Court in and for the Ninth Circuit, Northern District of California, file therein a transcript of the record in this action, and for the payment of all costs which may be awarded by said Circuit Court if said Court shall hold that this action was wrongly or improperly removed thereto. [35]

Your petitioner therefore prays that this Court proceed no further herein, except to make proper order for removal, as required by law, and to accept

the bond presented herewith, and that a transcript of the record herein be directed to be made as provided by law; and your petitioner will ever pray.

CHICKERING & GREGORY,
Attorneys for Petitioner.

State of California,
City and County of San Francisco,—ss.

George H. Whipple, being first duly sworn, deposes and says that he is one of the attorneys of the Alaska Fishermen's Packing Company, defendant in the above-entitled action, and petitioner above-named, and a member of the firm of Chickering & Gregory, attorneys of record for said defendant herein; that he makes this affidavit in behalf of said petitioner; that the said petitioner is a corporation incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and all its officers and agents are absent from the said City and County of San Francisco, where said attorneys of record and this affiant have their office; that the facts stated are within the knowledge of this affiant; that he has read the foregoing Petition and the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

GEORGE H. WHIPPLE.

Subscribed and sworn to before me, this 14th day of February, 1911.

[Seal]

M. I. LAWRENCE,
Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsed]: Filed Feb. 14, 1911. H. I. Mulcrevy,
Clerk. By D. J. Sullivan, Deputy Clerk. [36]

*In the Superior Court of the State of California,
in and for the City and County of San Fran-
cisco.*

No. 32,638.—Dept. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY (a Corporation),

Defendant.

Bond on Removal from State Court.

Know All Men by These Presents: That the under-
signed, Pacific Surety Company, a corporation, in-
corporated, organized and existing under and by
virtue of the laws of the State of California, for the
purpose of making, guaranteeing or becoming surety
upon bonds or undertakings required or authorized
by law, and having paid-up capital of not less than
one hundred thousand dollars, is held and firmly
bound unto the plaintiff in the above-entitled cause,
his heirs, representatives and assign, in the sum of
Five Hundred Dollars (\$500.00), lawful money of
the United States of America, for the payment of
which, well and truly to be made, said corporation,
Pacific Surety Company, binds itself, successors and
assigns, firmly by these presents.

THE CONDITION of this obligation is such that,
whereas, the defendant, Alaska Fishermen's Packing
Company, a corporation, has applied by petition to

the said Superior Court of the State of California, in and for the City and County of San Francisco, for the removal of a certain cause pending wherein Chin Quong is plaintiff and Alaska Fishermen's Packing Company, a corporation, is defendant, to the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California, for further proceedings, on the grounds in said [37] petition set forth, and that all proceedings in the said action in said Superior Court be stayed;

NOW, THEREFORE, if said petitioner, the said Alaska Fishermen's Packing Company, shall enter in said Circuit Court of the United States in and for the Ninth Circuit, Northern District of California, on or before the first day of the next ensuing session, a copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States if said Court shall hold that said suit was wrongly or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed by its vice-president thereunto duly authorized and its corporate seal to be affixed this 14th day of February, 1911.

PACIFIC SURETY COMPANY. [Seal]

By JOHN H. ROBINSON,

Vice-President and Attorney in Fact.

The foregoing Bond is approved and accepted.

Dated, February 14th, 1911.

JOHN HUNT,
Judge.

[Endorsed]: Filed Feb. 14, 1911. H. I. Mulerevy,
Clerk. By D. J. Sullivan, Deputy Clerk. [38]

*In the Superior Court of the State of California, in
and for the City and County of San Fran-
cisco.*

No. 32,638—Dept. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY
(a Corporation),

Defendant.

Order for Removal from State Court.

Defendant herein, Alaska Fishermen's Packing Company, a corporation, having within the time provided by law filed its petition for removal of said cause to the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California, and having at the same time offered its bond in the sum of five hundred dollars, with good and sufficient surety, pursuant to statute and conditioned according to law;

Now, therefore, this Court does hereby approve and accept said bond and accept the said petition, and does order that this cause be removed for trial to the United States Circuit Court for the Ninth Circuit, Northern District of California, pursuant to the statute of the United States, and that

all other proceedings in this court be stayed.

Dated February 14th, 1911.

JOHN HUNT,
Judge.

[Endorsed]: Filed Feb. 14, 1911. H. I. Mulcrevy,
Clerk. By D. J. Sullivan, Deputy Clerk. [39]

*In the Superior Court of the State of California, in
and for the City and County of San Fran-
cisco.*

No. 32,638—Dept. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY
(a Corporation),

Defendant.

Demurrer to Complaint.

Defendant above named demurs to the Complaint on file herein and for grounds of demurrer specifies:

1. That said Complaint does not state facts sufficient to constitute a cause of action against this defendant.

2. That the alleged First Cause of Action in said Complaint contained does not state facts sufficient to constitute a cause of action against this defendant.

3. That the alleged Second Cause of Action in said Complaint contained does not state facts sufficient to constitute a cause of action against defendant.

4. That the alleged Third Cause of Action in said Complaint contained does not state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE, defendant prays that it may be hence dismissed with its costs of suit.

CHICKERING & GREGORY,

Attorneys for Defendant.

Dated February 14th, 1911.

[Endorsed]: Filed Feb. 14, 1911. H. I. Mulcrevy,
Clerk. By D. J. Sullivan, Deputy Clerk. [40]

*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

No. 32,638.—Dept. No. 5.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY
(a Corporation),

Defendant.

Clerk's Certificate [to Transcript on Removal].

State of California,

City and County of San Francisco,—ss.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court in and for said City and County, hereby certify the foregoing to be a full, true and correct copy of the record and the

whole thereof in the above-entitled action heretofore pending in said Superior Court, being the suit numbered 32,638, upon the files of said Court, wherein Chin Quong is plaintiff and Alaska Fishermen's Packing Company, a corporation, is defendant, said record consisting of

1. Complaint filed by said plaintiff in said action.
2. Affidavit for attachment filed by the plaintiff in said action.
3. Undertaking on attachment filed by the plaintiff in said action.
4. Writ of attachment, together with the sheriff's return thereof filed in said action.
5. Affidavit for publication of summons filed by the plaintiff in said action.
6. Order for publication of summons filed by the plaintiff in said action. [41]
7. Appearance filed by the defendant in said action.
8. Notice of motion for an order to discharge attachment filed by the defendant in said action.
9. Order extending time to plead or move filed by the defendant in said action.
10. Order extending time to plead or move filed by the defendant in said action.
11. Order extending time to plead or move filed by the defendant in said action.
12. Report of appraiser L. H. Turner filed in said action.
13. Minute order made in said action and directing release of attachment upon the filing of an undertaking in the sum of eight thousand dollars.

14. Undertaking on release of attachment filed by defendant in said action.

15. Minute order made in said action and releasing attachment.

16. Petition for removal of cause on ground of diverse citizenship to the United States Circuit Court in and for the Ninth Circuit, Northern District of California, filed by the defendant in said action.

17. Bond on removal of cause from State Court to the United States Circuit Court filed by the defendant in said action.

18. Order for the removal of cause from the State Court to the United States District Court filed by defendant in said action.

19. Demurrer to Complaint filed by the defendant in said action; all as appears on the files and of record in my office.

Attest my hand and the seal of this Court this 4th day of March, 1911.

[Seal]

H. I. MULCREVY,
Clerk.

By D. J. Sullivan,
Deputy Clerk.

[Endorsed]: Filed Mar. 4, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[42]

At a stated term, to wit: the March term, A. D. 1911,
of the Circuit Court of the United States of
America, of the Ninth Judicial Circuit, in and
for the Northern District of California, held at

the Courtroom in the City and County of San Francisco, on Monday, the 15th day of March, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,289.

CHING QUONG

vs.

ALASKA FISHERMEN'S PACKING CO.

By consent of both parties and on motion on behalf of defendant it was ordered that the demurrer herein be and the same is hereby overruled with leave to the defendant to answer within ten days. [43]

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

No. —.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY
(a Corporation),

Defendant.

Answer and Counterclaim.

Now comes the defendant in the above-entitled action and answering to the Complaint of plaintiff on file herein admits, denies and alleges as follows:

I.

Denies that plaintiff has duly, or at all, performed

all, or any of the covenants, stipulations and/or conditions on his part to be performed under the agreement referred to in paragraph II of said Complaint, except as herein admitted, and in this behalf alleges that plaintiff failed to furnish competent workmen and failed to perform the work required by the said agreement in the manner and to the extent therein required, as will more fully appear from the counterclaim of defendant hereafter set forth, reference to which is hereby made, and for said purpose the allegations thereof are incorporated herein.

II.

Admits that the sum of \$14,000.00 was paid by this defendant to plaintiff, but denies that the said sum was at the rate of \$100 for each man furnished by the said plaintiff under the said agreement, and in this behalf alleges that said payment was at the rate of \$100 per man for each man required to be furnished by said plaintiff under the said agreement. [44]

III.

Admits that there would have been due and payable under the terms of said agreement by the said plaintiff to the said defendant the sum of \$36,300.00 upon the plaintiff's full performance of said agreement. And further admits that defendant has paid to plaintiff the sum of \$14,000.00, but denies that the plaintiff has fully performed the said agreement, and denies that there is due and payable, or at any time has been due and payable, under the terms of said agreement, the sum of \$36,300, or any sum.

IV.

Admits that the defendant has laid out and ex-

pended, at the request of said plaintiff and for and on his behalf, the sum of \$1,283.30. And admits further that the sum of \$2,448.00 is due to the defendant from the plaintiff for and on account of an excess of do-overs under said agreement. But denies that there is a balance due from defendant to the plaintiff under the said agreement of the sum \$18,568.70, or any sum, payable by said defendant under the terms of the said agreement to the Quong Kee Company, or at all. And in this behalf defendant alleges that defendant has laid out and expended at the request of the said plaintiff, and for and on his behalf the sum of \$1,331.30, and that the same, and no part thereof, has been paid by the defendant. And further alleges in this behalf that there is due by the said plaintiff to defendant for and on account of an excess of do-overs under said agreement the sum of \$7,872.00, and that the same and no part thereof has been paid by the plaintiff.

V.

Alleges as to the allegations contained in paragraph VIII of said complaint, that this defendant has no information or belief sufficient to enable it to answer and basing its denial upon this ground denies that Chin Quong, Chin Bing, Chin Hing, Chin Yoke and Chin Bin, were at all, or any, of the dates and times in the complaint [45] mentioned and/or now are copartners engaged in business in the City and County of San Francisco, State of California, under the firm name and style of Quong Kee Company, or at all.

VI.

Alleges as to the allegations contained in paragraph IX of said complaint, that this defendant has no information or belief sufficient to enable it to answer, and basing its denial upon this ground defendant denies that on or about the 12th day of November, 1910, or at any time, Quong Kee Company assigned, transferred and/or set over to the plaintiff all, or any, of its right, title and/or interest in and to said agreement and/or to all, or any, money due or to grow due thereon.

VII.

Admits that the defendant has not paid the said sum of \$18,568.70 and that the same is wholly unpaid. But in this behalf denies that the said sum of \$18,568.70, or any sum, is due by the defendant to the plaintiff under said agreement, or at all.

Answering to the second count in said complaint contained, this defendant denies, admits and alleges as follows:

I.

Denies that defendant is indebted to the plaintiff in the sum of \$1,671.40, or in any sum, on account of work, labor and/or services heretofore and within two years last past, or at any time, done and/or performed for the said defendant by the said plaintiff, at the special instance and request of the said defendant, in assembling and/or nailing up 26,000, or any, box shook, or at all, and/or for moneys paid and/or expended by the said plaintiff for the defendant, at its special instance and request, or at all. [46]

II.

Admits that no part of the said sum has been paid by the defendant, but denies that such sum, or any sum, is owing from the defendant to the plaintiff.

Answering to the third count in said complaint contained, this defendant admits, denies and alleges as follow:

I.

Denies that the defendant is indebted to the said plaintiff in the sum of \$18,568.70, or in any sum, or at all, on account of work, labor and/or services heretofore and within two years last past, done and/or performed by the said plaintiff for the defendant at the special instance and request of the defendant, or at all, in furnishing all the skilled and/or unskilled labor required at the canneries of the defendant at Nushagak, District of Alaska, or elsewhere, for the canning of salmon during the season of 1910, or at any time, and/or in receiving, cleaning and/or preparing the same, filling the same with fish, wiping, capping, soldering and/or testing the same when filled, dotting, venting and/or resealing the same, cooking, washing, piling, testing, labeling, testing, and/or putting the same in cases and/or nailing up the entire pack of said, or any, season.

II.

Admits that no part of said sum of \$18,568.70 has been paid but in this behalf denies that such sum, or any sum, is owing from the defendant to the said plaintiff under the said agreement, or at all.

Answering further to the complaint on file herein, and by way of counterclaim thereto, the defendant

alleges as follows:

I.

That the defendant is and at all times hereinafter mentioned was a corporation organized, created and existing under and by virtue of the laws of the State of Oregon. [47]

II.

That heretofore and on or about the 20th day of November, 1909, the said plaintiff and the said defendant made and entered into that certain agreement in writing, a copy of which is attached to the complaint on file herein, marked Exhibit "A," reference to which is hereby made and which is incorporated herein and made a part hereof.

III.

That the defendant has duly performed all of the covenants, stipulations and conditions of the said agreement on its part to be performed.

IV.

That the said plaintiff failed to furnish one hundred and forty men as required under said agreement, and in this behalf defendant alleges that the said plaintiff furnished only one hundred and thirty-eight men under said agreement. That the men furnished by said plaintiff to do the work under the said agreement were incompetent and unfit to do the work required thereby. That the plaintiff failed to do the work required by the said agreement in that through incompetence and unfitness of the men employed and furnished by him and their failure carefully, diligently and expeditiously to do the work required under the said agreement the plaintiff failed

to handle the quantity of salmon furnished by the defendant, and spoiled and rendered worthless large quantities of the salmon so furnished.

That on account of the said breach of the plaintiff in not furnishing the requisite number of men called for by the said agreement, and also on account of the men so furnished being incompetent, unskilful and unfit to do the work required, the defendant has been damaged in the following particulars:

(a) That under said agreement plaintiff was required to pack all the fish that this defendant should deliver to the plaintiff at defendant's cannery to the amount of at least 2,700 cases a day; [48] that between the 2d day of July and the 13th day of July, both dates inclusive, this defendant delivered at said cannery sufficient fish to have packed each day 2,700 cases in accordance with the contract; that the said plaintiff failed, by reason of the facts above set forth, to pack each day during the said time 2,700 cases, and by reason thereof defendant was compelled to and did dump and destroy 31,698 salmon fish that said defendant had caught and delivered at said cannery, and which plaintiff was required under the terms of said contract to pack; that said salmon were reasonably worth the sum of \$1,911.39; that said defendant by reason of the loss thereof has been damaged in said amount.

(b) That by reason of the said shortage of men and the said incompetence and unskilfulness of those furnished as hereinabove set forth, said plaintiff was unable to handle the quantity of fish supplied by the defendant to the plaintiff and was un-

able to pack 2,700 cases daily during the term of said contract, and by reason thereof defendant was compelled to limit the catch of its fish and to limit its fishermen to a limited number of fish per day less than they could and would have caught for the defendant, and by reason thereof this defendant lost 36,600 salmon that otherwise would have been caught by the said fishermen and supplied to the said plaintiff for the purpose of canning the said 2,700 cases of salmon per day, and by reason of the fact that said defendant limited its said fishermen as above set forth it was obliged to pay to the said fishermen the money they would have earned by catching the said fish if the said fishermen had not been limited as aforesaid; that by reason thereof said defendant was compelled to pay the said fishermen the sum of \$2,206.98 and by reason of the failure of said plaintiff to perform its contract in packing the requisite number of cases per day defendant was damaged in the said amount of \$2,206.98, which it was compelled to pay the [49] said fishermen for the said 36,600 salmon which they would have caught had they not been put upon a limit.

(c) That according to the terms of said contract the plaintiff was required to pack all salmon at the cannery of the defendant in a first-class, skilful manner and all leaky cans were to be mended by skilled labor, and all mended cans were to be accepted or rejected by the defendant according to the condition of the fish, and the defendant was not required to accept fish improperly packed; that by reason of the carelessness, unskilfulness and incompetency of

plaintiff and his employees, 2,045 cases of canned salmon were improperly packed and spoiled, to the loss and damage of the defendant in the sum of \$7,137.05; that plaintiff had knowledge that said canned salmon was put up for the defendant for the purpose of selling the same to purchasers thereof in the open market and that said defendant would have realized a profit upon the said sales; that said salmon when properly put up and canned has a standard price in the open market of \$5.40 per case, which consists of 48 cans; that the actual cost to the defendant herein of packing the said 2,045 cases was the sum of \$3.49 per case; that had the salmon therein referred to been properly packed this defendant would have been able to have sold the same in the open market and realized a profit thereon in the sum of \$3,905.95; that by reason of the negligence and unskilfulness of plaintiff and his employees, 2,045 cases of salmon were spoiled after they had been canned and by reason thereof unfit for sale this defendant has been damaged in the sum of \$11,043, which includes the actual cost of canning the said salmon and the profits which would have been realized upon the sale thereof.

(d) That said contract set forth and alleged in plaintiff's complaint, a copy of which is attached thereto, provided among other things that all leaky cans should be mended by skilled labor daily [50] by the plaintiff, the said mended cans to be accepted or rejected by the defendant according to the condition of the fish. If not so mended daily the plaintiff herein agreed to pay to the defendant herein the

sum of \$3.00 per case; that during said canning season of 1910, at the cannery of said defendant in Alaska, beginning on June 11th and ending July 22d, both dates inclusive, the said plaintiff negligently failed and neglected to mend or cause to be mended 2,624 cases of salmon then canned, and negligently failed and neglected to mend on the same day the said salmon was cooked or to mend daily as required by the contract the said 2,624 cases; that by reason thereof the said number of cases were damaged and unfit for use and this defendant duly rejected the same for the reasons aforesaid, and by reason thereof there became due and owing this defendant from plaintiff the sum of \$3.00 per case; that by reason of said facts defendant was damaged in the sum of \$7,872; that of said amount so claimed plaintiff in his account has allowed as excess of do-overs under the contract 1,360 cases at \$1.80 per case, aggregating the sum of \$2,448, which is part of the claim herein referred to and which said plaintiff in his account filed herein has credited to this defendant.

(e) That under the contract entered into between the plaintiff and defendant hereinabove referred to and set forth as Exhibit "A" in plaintiff's complaint, it is provided that the plaintiff should put up not less than 2,700 cases of fish per working day, provided they were furnished with the necessary fish for that purpose by the defendant; that between July 2d and July 13, 1910, both dates inclusive, said defendant furnished to plaintiff the necessary amount of fish each day to enable said plaintiff to can for said defendant 2,700 cases per day; that by reason of the

incompetency and unskilfulness of said plaintiff and his employees engaged on the work of canning the said salmon on said days said plaintiff did not perform its contract [51] by canning 2,700 cases of salmon per day, but, on the contrary, the difference between the number of cases of canned salmon put up by the plaintiff on each of said days and the number of cases required under the contract to be canned on each of said days, to wit, 2,700 cases, aggregated the number of 6,376 cases; that under said contract defendant is entitled to \$1.00 for each of said 6,376 cases, and by reason thereof said defendant has been damaged in the sum of \$6,376.

V.

That by reason of the failure of the plaintiff to furnish the number of men required by the said agreement and by reason of the incompetence and unfitness to do the work by the men furnished by the said plaintiff, and by reason of the failure by the plaintiff to perform properly and fully the work required to be done under the agreement the defendant has been damaged in the sum of \$26,961.37.

VI.

That no part of said sum of \$26,961.37 has been paid to the said defendant save and except the sum of \$23,971.40, and that the balance and the whole thereof is due and payable.

Answering further to the complaint on file herein, and by way of counterclaim thereto, defendant alleges as follows:

I.

Defendant hereby refers to and makes a part of

this answer and counterclaim all of paragraphs numbered I, II, and III and subdivisions a, b, c and d of paragraph IV of the first answer and counterclaim herein set forth, and hereby repeats and alleges everything in said paragraphs and subdivisions contained, and prays that same be taken and admitted as part of the further answer and counterclaim as though the same was herein set out at length.

(e) That under the contract entered into between the plaintiff and defendant hereinabove referred to and set forth as Exhibit "A" in the plaintiff's complaint, it is provided that the plaintiff [52] should put up not less than 2,700 cases of fish per working day provided they were furnished with the necessary fish for that purpose by defendant; that between July 2d and 13, 1910, both dates inclusive, said defendants furnished to plaintiff the necessary amount of fish each day, to enable said plaintiff to can for said defendant 2,700 cases per day; that by reason of the incompetency and unskillfulness of said plaintiff and his employees engaged in the work of canning the said salmon on the said days said plaintiff did not perform its contract by canning 2,700 cases of salmon per day, but, on the contrary, the difference between the number of cases of canned salmon put up by said plaintiff on each of said days and the number of cases required under the contract to be canned on each of said days by plaintiff, to wit, 2,700 cases, aggregated the number of 6,376 cases; that in the contract hereinabove referred to defendant guaranteed that 66,000 cases should be packed by the

plaintiff, and that he should receive 55 cents per case for each of said cases so packed; that defendant has been charged by the plaintiff in his said complaint with the sum of \$36,300 which is 55 cents for each of said 66,000 cases; that inasmuch as said plaintiff did not comply with his contract to the number of cases herein referred to, defendant has been damaged in the sum of \$3,506.80 by reason of the fact that it has been charged 55 cents for each of said 6,376 cases herein referred to; that plaintiff had full knowledge that said defendant entered into the said contract with the plaintiff for the purpose of packing salmon with a view to reselling the same in the open market; that each case of salmon is a standard package that consists of four dozen cans of salmon and brings in the market a standard price of \$5.40 per case; that the cost of producing one case of salmon to the defendants is \$3.49, and that the profit on the said cases herein referred to would have been \$1.91 had the same been packed by the plaintiff in accordance with his contract and sold by the defendant in the open [53] market; that by reason of the said default of said plaintiff in the said contract for the reasons herein stated said defendant has been damaged in the sum of \$1.91 for each of said 6,376 cases, aggregating the amount of \$12,178.16; that by reason of the facts herein stated to wit, the actual amount charged up against the defendant by plaintiff for said 6,376 cases and by reason of the loss of profits to defendant herein as hereinabove alleged, said defendant has been damaged in the sum of \$15,684.16.

II.

That by reason of the failure of the plaintiff to furnish the number of men required by the said agreement and by reason of the incompetence and unfitness to do the work by the men furnished by said plaintiff, and by reason of the failure by the plaintiff to perform properly and fully the work required to be done under the agreement the defendant has been damaged in the sum of \$36,270.33 as hereinabove set forth.

III.

That no part of said sum of \$36,270.33 has been paid to the said defendant save and except the sum of \$23,971.40, and that the balance and the whole thereof is due and payable.

WHEREFORE defendant prays that plaintiff take nothing by his complaint and that the defendant have judgment against plaintiff for \$12,298.93 together with interest and costs of suit.

CHICKERING & GREGORY,
Attorneys for Defendant. [54]

State of Oregon,
County of Clatsop,—ss.

W. F. McGregor, being first duly sworn, deposes and says: That he is an officer, to wit, President of Alaska Fishermen's Packing Company, the plaintiff in the above-entitled action, and makes this verification in its behalf. That he has read the foregoing answer and counterclaim and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he be-

lieves it to be true.

W. F. McGREGOR.

Subscribed and sworn to before me, this 7th day of April, 1911.

[Seal]

G. C. FULTON,

Notary Public in and for the County of Clatsop, State of Oregon.

[Endorsed]: Filed Apr. 19, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

Service of the within answer and counterclaim and receipt of a copy is hereby admitted this 19th day of April, 1911.

JOHN F. THORNTON,
Attorney for Plaintiff. [55]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, Northern District of Cali-
fornia.*

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY (a Corporation),

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum

68 *Alaska Fishermen's Packing Company*

of Twenty Thousand One Hundred and Ninety-two
10/100 Dollars.

JAS. E. BRITT,
Foreman.

[Endorsed]: Filed Octr. 18, 1911. Southard
Hoffman, Clerk. By W. B. Maling, Deputy Clerk.
[56]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, Northern District of Cali-
fornia.*

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Judgment.

This cause having come on regularly for trial upon the 5th day of October, 1911, being a day in the July, 1911, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; John T. Thornton, Esq., appearing as attorney for the plaintiff and Warren Gregory and G. C. Fulton, Esqrs., appearing as attorneys for the defendant, and the trial having been proceeded with upon the 6th, 11th, 17th, and 18th days of October, all in said year and term, and evidence oral and documentary, upon behalf of the re-

spective parties having been introduced and closed and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict which was ordered recorded, viz.: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Twenty Thousand One Hundred and Ninety-two and 10/100 Dollars. Jas. E. Britt, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Ching Quong, plaintiff do have and recover of and from Alaska Fishermen's Packing Company, a corporation, defendant the sum of Twenty Thousand One Hundred Ninety-two and 10/100 (20,192.10) Dollars, together with his costs in this [57] behalf expended taxed at \$524.05.

Judgment entered October 18, 1911.

SOUTHARD HOFFMAN,
Clerk.

By W. B. Maling,
Deputy Clerk.

A true copy. Attest:

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Maling.
Deputy Clerk.

[Endorsed]: Filed October 18, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

[Clerk's Certificate of Judgment-roll.]

*In the Circuit Court of the United States Ninth
Judicial Circuit, in and for the Northern District
of California.*

No. 15,289.

CHIN QUONG

vs.

ALASKA FISHERMEN'S PACKING CO. (a
Corp.).

I, Southard Hoffman, Clerk of the Circuit Court
of the United States, for the Ninth Judicial Circuit,
Northern District of California, do hereby certify
that the foregoing papers hereto annexed constitute
the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court
this 18th day of October, 1911.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed October 18, 1911. Southard
Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[59]

In the United States District Court, Northern District of California, Division 2.

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY (a Corporation),

Defendant.

Defendant's Engrossed Bill of Exceptions.

BE IT REMEMBERED, that this action was brought on for trial before the said Court, Hon. WILLIAM C. VAN FLEET, District Judge, presiding, and a jury, J. T. Thornton, Esq., appearing for the plaintiff, and G. C. Fulton, Esq., and Warren Gregory, Esq., for the defendant.

A jury was thereupon impaneled and sworn, and the plaintiff, to maintain the issues on his part, produced the following testimony:

[Testimony of Chin Quong, for Plaintiff.]

CHIN QUONG, called as a witness for plaintiff, being first duly sworn, testified as follows:

I am the plaintiff in this case. I speak English a little. I recognize the document shown me as the contract between myself and the defendant.

(This contract was thereupon admitted in evidence and marked Plaintiff's Exhibit 1. It is in the words and figures of Exhibit "A" attached to the Complaint herein.)

(Testimony of Chin Quong.)

The witness continuing testified: With reference to this contract, I hired 140 men and put [60] them aboard of the ship "St. Francis" on the 10th or 11th of April, 1910. I know the names of the men put upon the ship. The foreman was Kep Yung. I recognize the list shown me as that of the men who went on the ship. There were 81 Chinamen. The Japanese foreman hired 49 men, and there were 10 Filipinos.

(The list was thereupon introduced in evidence and marked Plaintiff's Exhibit 2. Which said exhibit was in the words and figures following:)

[Plaintiff's Exhibit No. 2.]

**CHINESE EMPLOYEES 1910, ALASKA
FISHERMEN'S PACKING COMPANY.**

Kep Yung	Foreman	Hui Lun	Bathroom
Hom Sing	Tester	Lem Hao	"
Quan Loi Fong	"	Lem Shung	"
Ming Gee	"	Lee None	"
Hon On	Sol-Mach.	Lao Koon Shur	"
Hoa Jong	"	Lui Jung	"
Lee Jung	Mend-Leak	Yee Fat	"
Chin Cheong	"	Chin Gay Ham	"
Lee Guey	"	Ham Munn Fong	Label
Tui Goon	" Bookr	Chan Won Cheang	Bathroom
Lee Sing	"	Lee Dan	"
Ng Lun	"	Toy Hoy	"
Jan Fong	"	Chin Sing	Tops-Bots
Hong Sing	"	Wong Gong	"
Jew Tay	"	Leong Heang	"
Chin Toy Poy	"	Hui Tong	Label
Woo Hay	"	Wong Lung	"
Gee Wa Neuy	"	Hui Gar	"
Lee Hang	Cook	Chin Won	"
Yui Chan	Mend-Leak	Lee Cheong	"
Hoa Yew	Cook-Solder	Lee Lep	"
Chin Duye	Fill-Coolers	Wong Wing	Label
Ham Quan Fong	"	Chow Sung	"

(Testimony of Chin Quong.)

Bak Chay	"	Lui On	"
Lung Sic	Dotter	Lui Woey Suey	Test-Kettle
Ng Lin	"	See Who Yu	Laborer
Lee Gum	"	Lee Goon	"
Lee Fune	"	Hom Fune	"
Chin Sic Ling	Butcher	Lee Mew	"
Kong Neong	Dotter	Lee Hoa	"
Wong Hing	Test-Kettle	Cheong Jip	"
Yee Bing	"	Leong Lun	"
Lem Hing	"	Lew Wing Leong	"
Ham Look	"	Wong Shue	"
Woo Gook	"	Chin San Quong	"
Ham Gop	"	Chin Sang	"
Guey San	"		
Chin Pak Lung	Mend-Leak		
Chin Gee	Butcher		
Ng Ming	"		
Chin Him	"		
Mar Shing	"		
[61]			
Chin Bak	Butcher		
Lee Lung	"		
Yuen Son	"		

SUMMARY

81 Chinese

49 Japs

10 Mex-Phil. & Porto Ricans

140

(Subsequently the evidence of the witness concerning the number of men who went on board the ship was struck out as hearsay, it appearing that the witness himself did not see them go on board ship nor on the ship.)

Witness continuing testified: The list contains three testers, one cook, and one Chinese foreman.

I have been in the United States 28 years and was born in China. When coming to the United States I first went to Astoria, where I went into the cannery business, working for a Mr. Quinn. Then I worked for the Astoria Cannery and for the Scandinavian Union.

(Testimony of Chin Quong.)

All the men on this list were skilled men in that business and had many 'years' experience. Upon the return of the men to San Francisco I paid them off, including the three testers and the cook, at \$50 a month, and the foreman at \$75 a month. I got a pile of money and paid all the men off.

With reference to my getting money from the defendant, I sent a letter October 15th or 18th saying, I am all finished for a settlement, and asked for a settlement.

(The defendant thereupon stated that *the* admitted that a demand had been made on the defendant.)

Witness continuing: They finally requested me to come to Astoria.

At the time I made the contract the Quong Kee Company was composed of Chin Quong, Chin Bing, Chin Hing, Chin Yoke and Chin Bin. It was a partnership, and all the members were natives of China. [62] I am a member of the Quong Kee Company and managed its business. I was its managing partner. I executed an assignment, and the signature "Quong Kee Co." to the document you show me is my signature.

The witness testified that as a member of the partnership he assigned to himself as an individual.

The said document was thereupon offered in evidence by the plaintiff and the defendant objected on the ground that it was not proper, in that the same individual as a member of the partnership could not make an assignment to himself. The objection was

(Testimony of Chin Quong.)

overruled and defendant duly excepted.

(Defendant's exception No. 1.)

(The document was thereupon introduced in evidence and marked Plaintiff's Exhibit 3. It was as follows:)

[Plaintiff's Exhibit No. 3.]

"San Francisco, November 12th, 1910.

For value received, we, the undersigned, Quong Kee Company, a copartnership doing business in the City and County of San Francisco, State of California, do hereby assign, transfer and set over to Chin Quong, of San Francisco, his heirs and assigns forever, all our right, title, and interest in and to and under the within instrument and contract bearing date the 20th day of November, A. D. 1909, between Chin Quong as the party of the first part, and the Alaska Fishermen's Packing Company, a corporation, as the party of the Second part, and to all moneys due or to grow due thereon, amounting at the present time to the sum of eighteen thousand five hundred and sixty-eight and 70/100 (\$18,568.70) dollars, which said sum is justly due the undersigned from said Alaska Fishermen's Packing Company under the terms of said contract.

In Witness Whereof, we have hereunto set our hand and seal the day and year first above written.

QUONG KEE CO. [Seal]

Witnessed by

H. J. BARLING, Nov. 12, 1910, 8:15 P. M.

GEO. W. DUFFIELD, Nov. 12/10 8:30
P. M."

Witness continuing: At the time I made the con-

(Testimony of Chin Quong.)

tract, and ever since, I owned the contract and used my individual money in carrying out the terms of the contract. [63]

On cross-examination the witness testified: I have been in Nushagak, Alaska, a long time ago. I did not go up there in 1910. I saw these men go on board the ship when they left San Francisco. I did not go on board the ship myself. I did not go down to the wharf and did not see them on board myself. I got my foreman to go up. When I say that 140 men went on board the ship I state what the foreman told me.

(Thereupon, upon motion of the defendant, as previously stated, all the evidence given by the witness as concerning the number of men who went on board the ship was stricken out as hearsay.)

Witness continuing: The 140 men include the foreman. They were all in good condition, healthy, and able to work. The foreman was not sick. I saw him myself. It is not true that he was going around on crutches. He fell down on the ship and got hurt. He was all right when he went on board the ship, but on board the ship he fell down and got pretty badly hurt. I never saw these men myself working in a cannery.

On redirect examination the witness testified (Dr. Jones having then been produced as an interpreter and the subsequent examination of the witness being conducted through such interpreter): I had seen these men a long time working as cannerymen. I had seen all the Chinamen in this list but not the Japanese nor the Filipinos. I was working in the cannery my-

(Testimony of Chin Quong.)

self at the time but I did not see them at work.

Q. How many years is it since you yourself worked in a cannery? A. Well, between 10 and 20 years.

The INTERPRETER.—He says he went to Alaska from the 15th to the 23d year until four years ago.

The INTERPRETER.—He is entirely wrong from the very beginning as [64] to his computation of dates. He is ten years out in his calculations. He means from the 15th year,—he went from the 15th year, and this would be the 37th year and not the 27th year.

Q. So that it is about 15 years ago that you worked in Alaska, is it not? A. Yes.

The COURT.—Tell him to point out to you on this list the unskilled laborers.

The INTERPRETER.—These are all Chinese names on this list.

The COURT.—Did the Filipinos and Mexicans go as skilled or unskilled laborers?

A. They went as already having worked at the business. The Japanese had worked for me four or five years in a cannery. All of these 140 men had worked for me previously.

[Testimony of Kep Yung, for Plaintiff.]

KEP YUNG, called as witness for plaintiff, being first duly sworn, testified as follows:

I was the Chinese foreman for the year 1910, at the Nushagak Cannery of the Alaska Fishermen's Packing Company. I went from San Francisco on the ship "St. Francis." I took up with me 140

(Testimony of Kep Yung.)

men,—81 Chinese, 49 Japanese and 10 Mexicans.

This—Plaintiff's Exhibit 2—is a list of the Chinese I took up on that ship. I have seen it but I don't read. I saw them with my own eyes.

I have been in the cannery business 30 years, continuously up to the present year. I was not able to go this year.

The men we took up in 1910 were skilled laborers. They all commenced to work at the cannery about the middle of the Chinese 2d month, and worked until about over the middle of the Chinese 7th month.

The INTERPRETER.—That would be from our 3d month to our 8th month. [65]

Witness continuing: We packed about 44,000 cases of salmon. It was taken on board defendant's sailing ships. All the salmon they furnished us to pack was canned. There were some fish that were no good and they were thrown away, because they were white meat. We only canned the red salmon and not the white.

Q. Were any of the red permitted to spoil and were thrown away because your men could not pack them?

A. No, there was no reason of that kind.

Q. Were any of the reds permitted to spoil after they were caught?

A. If we did not get them all done, some of them would spoil.

Q. Did it occur that there were any times when they could not cook them all and they were spoiled?

A. Sometimes.

Q. How many?

(Testimony of Kep Yung.)

A. Well, I could not say how many were spoiled.

Q. How often did that occur?

A. Two or three times that happened.

The COURT.—How many cans of salmon did you can a day?

A. Over 1,000 cases.

The witness continuing: I was employed by Chin Quong, and all these men were employed by him. I know Hom Sing; he was an assorter or tester; he would pick out what was right and what was not. I know also Quan Loi Fong. I knew these men 10 or 20 years and worked with them in Astoria. I know Ming Gee; his business was the same. I have known him seven or eight years; he had been in the cannery business all of that time. I know Hom On and what his business in the cannery was—he floated. I know Hoa Jung just the same, over 10 years, at Astoria. I know Chin Cheong; he was fixing the broken cans. I know Lee Gueu; just the same. [66]

All the men that we took up there were experienced cannery men. They were men who worked a long time at the cannery business.

Upon cross-examination the witness testified: There were 140 men put on board, counting myself. I fell down on the ship and got hurt.

The COURT.—Was that when you started from San Francisco or after you were on the way?

A. I had already been out four days.

Counsel continuing:

Q. As a matter of fact, you were laid up and incapacitated all this summer from working, were you

(Testimony of Kep Yung.)

not? A. I watched over them.

Q. But you had a doctor all the time, did you not?

A. Yes, a white doctor.

Q. You were on crutches, were you not, all that season up there? A. Yes.

Q. Is it not a fact that you were hurt on a street-car here in San Francisco before you went on the boat at all?

A. No, after I went down on the boat I fell down.

Q. You say that some red salmon were thrown away. About how many red salmon were thrown away during the season?

A. Well, I was so lame that I could not go out and could not see how much.

Q. You do know that some were thrown away, do you not?

A. I did not see with my own eyes because it was so slippery in the cannery that I did not dare to walk there.

Witness continuing: I was the Chinese boss and had charge of all the Chinese. [67]

Mr. GREGORY (Counsel for Defendant).—Q. Do you remember when there was a very heavy run of fish between the 2d and 13th of July?

A. Yes.

Q. There were a great many fish left at the cannery each one of those days, were there not? I mean brought to the cannery on each one of those days?

A. Yes.

Q. About how many thousand fish a day, if you

(Testimony of Kep Yung.)

know, were brought to the cannery on those days, each day?

A. I don't know how many; I could not say how many.

Q. How many fish does it take to make a case of salmon?

A. Sometimes one fish will make three cans and sometimes two and a portion of a can.

Q. Did you ever can 2,700 cases on any single day that season?

The COURT.—You had better find out first if they ever had fish enough furnished them to can that many.

Q. During the time I have named, that is, between the 2d and the 13th of July, was there not fish each day brought to the cannery sufficient to can 2,700 cases?

A. Well, according to this float, this float was over-run, that is all they could run over the float every day.

Q. You mean run over with fish?

The INTERPRETER.—As many cans as they could run over the soldering, as I understand.

Q. Did you have enough fish to can 2,700 cases a day during that time?

A. Yes, there were enough fish, but it was beyond the capacity of the soldering machines.

Mr. GREGORY.—I ask that the last portion of the answer go out as not responsive. [68]

The COURT.—I will let the answer stand.

Mr. GREGORY.—We note an exception.

(Defendant's Exception No. 2.)

(Testimony of Kep Yung.)

(Subsequently the said matter concerning the machinery was eliminated, as hereinafter shown.)

Q. Did not the superintendent of the cannery constantly tell you that your men were not handling the salmon fast enough?

The INTERPRETER.—What is the name of the man, a white man or a Chinaman?

Mr. GREGORY.—Our superintendent, a white man?

The COURT.—The question is, did not the superintendent tell him that his men were not handling that salmon fast enough?

A. I was hurrying the men along but the machinery was not kept in order.

Mr. GREGORY.—I ask that that go out as not responsive. I asked if the superintendent did not tell him that.

The COURT.—Yes, let that go out. Just answer the question.

A. Yes, but when the things were not in order how could they go any faster?

Mr. GREGORY.—Q. Did you not tell the superintendent that the men were not good and you could not get out any more than you were getting?

A. They were all men that were qualified.

The COURT.—Mr. Interpreter, you did not make him understand you. The question is if he did not tell the superintendent that the men were not competent to handle any more?

A. No, I did not say so.

Mr. GREGORY.—Q. Did not some of the white

(Testimony of Kep Yung.)

men and the superintendent himself come down and try to work to help you out?

A. Well, they would help me and I would help them.

Q. Yes, that is the issue in this case. When your ship sailed away, did you not leave a great many cans there in the cannery spoiled? [69]

A. A few hundred.

Q. About how many? A. 600 or 700.

Q. As a matter of fact, were there not 2,045 cases of salmon left there on the wharf? A. No.

Q. What was the matter with those cans that were left there?

A. Because we were called to come back to San Francisco.

The COURT.—Q. Before you finished them, do you mean? A. Yes.

Mr. GREGORY.—Q. You had charge of these men when they went on the boat, did you not?

The COURT.—You mean from San Francisco?

Mr. GREGORY.—Yes, your Honor.

A. Yes.

Q. The plaintiff, Chin Quong, was not there, was he, when they went on the boat?

A. Yes, he was there attending to them going on the ship.

Q. After the ship sailed, you were the only man that represented Chin Quong with these men until you got back, were you not?

A. I was the only one who had charge after she sailed.

(Testimony of Kep Yung.)

Q. After the men got up to Alaska, did not two men go off and work in another cannery? A. No.

Upon redirect examination the witness testified:

Mr. THORNTON.—Q. What was the matter with the solder machine? A. It was too short.

Mr. GREGORY.—I desire, with permission of the Court—I did not hear the question—I interpose an objection to it as if it had not been answered. We desire to object to it as immaterial, irrelevant and incompetent, and not embraced within the pleadings as they now [70] stand. Plaintiff is counting here upon a full performance of his contract, and if he desires to show reasons why he did not fully perform the contract, he must allege it in the complaint. We have some authorities directly on that point.

The COURT.—I will let it stand.

Mr. GREGORY.—We note an exception.

(Defendant's exception No. 3.)

(Subsequently the Court, of its own motion, eliminated said matter.)

Mr. THORNTON.—Q. State if there was any difficulty in keeping the solder hot in those solder machines.

Mr. GREGORY.—The same objection, your Honor.

The objection was overruled and exception noted.
(Defendant's exception No. 4.)

Witness continuing: A. There was not enough fire.

The COURT.—What does he mean by "not enough fire"?

(Testimony of Kep Yung.)

A. Because of the water that was descending, they could not get heat enough, the heat that got at the cans; they did not get heat enough reaching the cans on account of the water that was descending.

Mr. THORNTON.—That cannot be right, your Honor.

Mr. GREGORY.—I think the witness should be asked this question: What was the matter with the soldering machines?

The COURT.—Yes, I think that is the question that should be asked him.

The COURT.—Mr. Interpreter, ask him this question: What was the matter with the soldering machines?

A. Because the fire was not hot enough and the solder did not melt enough. There was not sufficient heat for the solder. When the heat was sufficient then the solder would work all right, but when it got cold then the thing did not work properly.

The COURT.—Whose duty was it to furnish the heat? [71]

A. The white man attended to the heat.

The COURT.—Ask him if there was any trouble with the machine that it would not heat up.

A. It was too short. It should have been so long (showing) but it was this long (showing).

Q. What was it that was too short?

A. The solder pot or solder pan.

Mr. THORNTON.—Q. What was the matter with any of the other machinery in the cannery?

Mr. GREGORY.—Your Honor understands that

(Testimony of Kep Yung.)

we have an objection to all this line of testimony upon the ground that it is immaterial, irrelevant, and incompetent, and not within the issues?

The COURT.—Yes.

Mr. THORNTON.—Q. Was there anything the matter with the toppers, the can toppers?

A. When the right quantity of fish was in the can then it would take the cover all right, but when the right quantity of fish was not in, that is, when it would be a little overfull, then it would not fasten the covers.

The COURT.—Well, whose duty was it to put the right quantity of fish in the can?

A. There is a rammer that rams the fish in.

Mr. THORNTON.—Q. Whose duty was it to adjust the plunger in the can-filling machine?

A. Our men.

Q. Did you say that it was the duty of Chin Quong's men to adjust the plunger?

Mr. GREGORY.—I submit that he has already answered that.

Mr. THORNTON.—Well, your Honor, he does not understand the question.

The COURT.—All we want to know is that the witness understands. [72] Was it the duty of Chin Quong's men to fix this plunger so it would properly tamp the fish into the can?

The INTERPRETER.—My own idea of what his answer meant was that it was one of Chin Quong's men who was feeding the thing and attending to it.

The COURT.—Well, make him understand what

(Testimony of Kep Yung.)

we are asking. You know we are not asking him that question.

The INTERPRETER.—I know it, your Honor, but that is the answer he gave.

The COURT.—Before you take his answer see that he understands the questions that are put to him through you.

A. If the plunger should not work right then the white man has to attend to it.

Mr. THORNTON.—Q. Now, as to two of the top-pers used in that cannery, were they combination toppers and crimpers, or was the crimping machine separate and apart from the topper?

A. It was with which they put the top on and passed it along to where they did the crimping.

The INTERPRETER.—I will try and put that question again to him. This is the way he answers it: Here is one machine that puts the thing on and then it passes on to the other machine. He operates his hands this way as though the can turned around and something tightened it.

Mr. THORNTON.—Q. Did that third topper top and crimp by the same operation?

A. It did not tighten it.

Q. Is the third topper a new topper?

The COURT.—What is the object of this examination by you, now?

Mr. THORNTON.—It is along the same lines, if your Honor please, to prove the deficiency in this machinery. It shows one good topper and two bad ones. [73]

(Testimony of Kep Yung.)

The COURT.—Do you propose to show that that is a part of the reason why they did not pack more?

Mr. THORNTON.—Precisely, if you Honor please, and to show further that the other toppler was not used.

A. I don't know of the other machine. I did not see it. That is a new one.

Q. Do you know the amount of fish that was delivered to the defendant's cannery during the rush of fish?

The INTERPRETER.—The amount per day do you mean?

Mr. THORNTON.—Yes.

A. I don't know.

Upon recross-examination witness testified: The white man lighted the burners under the solder machines.

(It was thereupon stated by the Court that the witness had testified that a Chinaman had charge of the plunger that put the fish in the can.)

Q. How long was this bath and solder machine?

A. The whole float was about 6 feet, while what had the solder was 4 feet.

Q. You say you did not get any injury until after you got on board the vessel?

A. No, there was nothing happened.

Q. Didn't you go down and get on the ship two days before she sailed, and go to your bunk, on account of this injury?

A. No, not until I got there.

Mr. GREGORY.—Q. Do you know Mr. Young,

(Testimony of Kep Yung.)

the inside cannery boss?

A. Yes, I knew him when I got down on the boat.

Q. Did you send for him two days before the boat sailed and tell him, no one else being present, that you had been hurt on a street-car? [74]

A. I did not say anything about any hurt. I sent for him, but I did not see him. I do not know Mr. Johansen.

Q. Can you speak any English? A. No sabee.

[Extracts from Deposition of E. P. Nounan, for Plaintiff.]

Plaintiff thereupon read extracts from the deposition of E. P. NOUNAN, Secretary of defendant.

My name is E. P. Nounan; age, 44 years. I am Secretary of the Alaska Fishermen's Packing Company. My residence is at Astoria, Oregon.

(Plaintiff thereupon offered in evidence the Sales Account for the year 1910.)

(This account was then admitted by defendant as being its Sales Account, but its admission was objected to as immaterial, and that the price for which the salmon was sold was not in issue.)

(The objection was overruled and exception noted.)

(Defendant's exception No. 5.)

(Thereupon the Sales Account was introduced in evidence and marked Plaintiff's Exhibits "O" and "N," attached to the deposition of Mr. Nounan.)

(Which said exhibits are in the words and figures following:)

[Plaintiff's Exhibit "O."]

Shipped Ex Ship San Francisco.

2845	King Talls	King Salmon	\$1.40	per doz.
500	Dinner Bell	Red Salmon	1.35	" "
583	"	"	1.35	" "
583	"	"	1.35	" "
882	"	"	1.35	" "
637	"	"	1.35	" "
735	Saturn	"	1.35	" "
735	Domestic	"	1.35	" "
637	Dinner Bell	"	1.35	" "
294	"	"	1.35	" "
294	Saturn	"	1.35	" "
294	Dinner Bell	"	1.35	" "
294	Domestic	"	1.35	" "
[75]				
294	Dinner Bell	Red Salmon	\$1.35	per doz.
294	Saturn	"	1.35	" "
600	Domestic	"	1.35	" "
735	"	"	1.35	" "
75	Dinner Bell	"	1.35	" "
150	Friends tall (chums)	"	.80	" "
318	Saturns "	"	1.35	" "
343	Domestic "	"	1.35	" "
1400	"	"	1.35	" "
1038	Dinner Bell	"	1.35	" "
294	Saturn	"	1.35	" "
367	Domestic	"	1.35	" "
208	Friends tall (chums)		.77½	" "
294	Dinner Bell	Red Salmon	1.35	" "
281	Friends tall (chums)		.77½	" "
392	Dinner Bell	Red Salmon	1.35	" "
183	Friends tall (chums)		.77½	" "
294	Dinner Bell	Red Salmon	1.35	" "
281	Tatoosh tall	"	1.35	" "
281	"	"	1.35	" "
294	Domestic "	"	1.35	" "
294	" "	"	1.35	" "
147	" "	"	1.35	" "
228	Tatoosh "	"	1.35	" "
100	Pony "	Med. Red	1.25	" "

100	Friends “ (Chums)		\$.80	“	“
294	Domestic “	Red Salmon	1.35	“	“
281	Tatoosh “	“	1.35	“	“
199	“ “	“	1.35	“	“
1000	Red Seal “	Red Do-Overs	.85	“	“
154	Moirs “ (Chums)	“	.65	“	“
600	Friends “ (CHUMS)		.80	“	“
600	Red Seal “	Red Do-Overs	.85	“	“
407	Friends “ (Chums)		.77½	“	“
103	Dinner Bell tall	Red Salmon	1.50	“	“
11	Domestic tall	“	1.50	“	“
204	Tatoosh “	Red Do-Overs	1.50	“	“
538	Pony “	Med Reds	1.50	“	“
1083	Tatoosh “	Red Do-Overs	.85	“	“
376	Saturn “	Red Salmon	1.35	“	“

24448 From Ship St. Francis.....

SUMMARY.

1474	Tatoosh Heavy Doovers	1.35 Per Doz.
2837	Read Seal Light Doovers	.85 “ “

4311

98 Cases Swells picked out

4409

[76]

[Plaintiff's Exhibit "N."]

Salmon Shipped Ex Barque "FLINT" from San
Francisco to United Kingdom.

900 Cases Dinner Bell

900 " Saturn

450 " Domestic

2250 Cases 23S-3d CIF London or Liverpool

2500 Cases Gorsedd

2000 " "

2250 " Dinner Bell

1250 " "

997 " Domestic

611 " Dinner Bell

348 " Domestic

9956 Cases 23S-3d CIF London or Liverpool

5618 Gorsedd 23s-3d CIF London or Liverpool

154 " " " " " "

17978 Cases

Thereupon plaintiff rested.

The defendant thereupon made the following motion:

The defendant moves for a nonsuit in this case so far as the cause of action first set up is concerned. The grounds of said motion are, that the said first cause of action is based upon the full performance by the plaintiff of all the covenants, stipulations and conditions of a certain written agreement, exhibit "A," which is incorporated in said first count. That

there is no statement made in said count concerning any machinery, nor is there any excuse therein set forth as to the reasons plaintiff did not pack 2,700 cases per day when furnished with fish for that purpose. That the evidence shows that the plaintiff did not pack 2,700 cases of fish per day when furnished with fish for that purpose. [77] Therefore it appears from plaintiff's own case that he has not complied with all the provisions of the contract imposed upon him. Therefore, and under that state of pleadings, the defendant is entitled to a nonsuit so far as the first cause of action is concerned.

And upon the further ground:

That the testimony here shows that plaintiff and defendant contracted to do this work with reference to particular machines and machinery, and there was no misrepresentation as to their character, and that plaintiff is bound by the contract and could not avoid the consequences of it unless it was upon false representations, or misrepresentations of some kind as to the character of the machinery.

The said motion was then denied and an exception allowed to defendant.

(Defendant's exception No. 7.)

The defendant thereupon, to support the issues upon its part, introduced the following evidence:

[Testimony of P. A. Berglund, for Defendant.]

P. A. BERGLUND, called as a witness for defendant, being first duly sworn, testified as follows:

I am a cannery-man. I have been engaged in that business for 13 years. In 1910 I was superin-

(Testimony of P. A. Berglund.)

tendent of the defendant's cannery at Nushagak. I have been with the defendant about 13 years. I am familiar with the conduct and management of a salmon cannery in Alaska, and with the requirements of a Chinese crew of cannery-men. I was at the cannery during the season of 1910. The men furnished were incompetent and careless. They were both slow and careless.

The process by which salmon are canned is briefly as follows:

Assuming that the salmon are laid on the wharf, then they are cleaned by the men afterward on the tables. Afterwards they are thrown into a tank, washed out and put into conveyors, which convey them into a fish-rack and from there it is fed by their men into a fish-cutter, cut up the right size for the filling machines. From the fish-cutter it drops on to another fish-rack and from there it is fed by two Chinese [78] or Japanese, whichever they may be, into the filling machine, and from the filling machine it is taken away by a man and set on a table where they are assorted out, light or full weight cans—and any light weight cans are supposed to be refilled by hand; there are always two or three men, or as many as may be required for such purpose. It depends considerably on the men feeding the filling machines. If they keep their machines full of fish and feed the can it will be a full can, otherwise it will not be a full can. From there it goes into a steam washer, where the can is washed clean. As it comes out of the steam washer it is

(Testimony of P. A. Berglund.)

chipped, as we call it, or an inside cap put on top of the fish. From there it goes to the topping machine and from the topping machine it goes to a crimping machine, where it is crimped. From the crimping machine it goes to an acid machine, and from the acid machine into the solder bath. From the solder bath it goes on to an endless chain and taken off to a chute where it is turned over, and where men are taking the cans and piling them into coolers, as we call them—iron crates or trays; then the vent-hole is stopped by the skilled labor. We have to stop the vent-hole before they are cooked. After the vent-hole is stopped they are put in a testing kettle and tested and all the leaks picked out. There is a steam coil inside the water tank which is called the testing kettle and when it bubbles it shows there is a leak; then we take the leaks out and they are mended by hand afterward—they are supposed to be. From this testing kettle they are put on a car and that car goes into the retort, and they are cooked there for half an hour; then they are taken out and punctured. There is a vent-hole in them twice, to create a vacuum in the can, and after that it is soldered up. When that is soldered up it is put in the second time for another hour's cooking. From that retort it goes to a lye-tank and a water-tank, and it is washed, and then trucked into the warehouse where it is allowed to stand until it is cooled off. Then it is tested by testers and tacked; if it is a leaky can it gives a hollow sound; if it is a good can it gives a solid sound. Then, it is practi-

(Testimony of P. A. Berglund.)

cally [79] finished. It is finished during that time. After the season is over we lacquer and label them. Of course, we pick out any cans which might have been piled in as good cans but which are defective cans.

Witness continuing: These men were not able to keep up with the fish as supplied them.

Q. Whereabouts in this process did they first begin to fall behind?

A. Where they took the cans from the chute, where they are piled into the iron crates or coolers. That was the first place.

Q. Does that require a skilled man to do that?

A. Not practically skilled, at the same time he ought to be used to it.

A. And he has to lay them ends on, with the vent-hole up.

Witness continuing: They began to be slow in taking them out of the soldering machines on the first day of the run, and before. This retardation or slowness in the work continued throughout the season. I spoke to the men about it and they said they could not do any better. I tried to help them out.

Q. Did you stop the machines?

A. I had to slow them down so they would not be crowded too much. Whenever the chute is crowded it takes a longer time for a man to pick out a can, because they are jammed, and it is hard on their fingers.

Witness continuing: The burner on the soldering machine was lighted by the night watchman in the

(Testimony of P. A. Berglund.)

morning. The man running the soldering machine was supposed to have just the fire desired. There was a stop-cock on the burner for both air and oil. The stop-cock was adjusted by the operator, who was one of the plaintiff's men.

Q. What was customarily understood as to who should have charge of the heating, and who did have charge of the heating of the [80] solder machines?

A. The contractor, of course.

Q. Was that a Chinaman?

A. Yes, sir. That has always been the case.

Witness continuing: After they left the soldering machine, there was the biggest delay where they were stopping the vent-holes. The consequences were that we got piled up so much at that end that we had as high as 300 cases ahead in the forenoon even.

Q. What did you do with those 300 cases?

A. We had to slow down and stop the machines so as to let them get cleared up.

Witness continuing: If this machine is running at a certain number of revolutions per minute, and it is constantly fed, its output will always be the same. There was their delay in testers; that was the principal delay.

Q. How many fish during this run from July 2 to July 13, 1910, did you have delivered at the cannery there each day?

A. I cannot tell exactly, but the books will show exactly the number. I had to curtail the catch from that on.

(Testimony of P. A. Berglund.)

Q. Why did you curtail the catch?

A. Because we could not get away with them. I was fooled by the expectation of getting the cans through. For that reason we had to throw them away. I always used to be figuring on so many fish per case and that so many boats will catch so many fish, and I curtailed the catch according to the cans of our crew in the cannery.

Q. How did you curtail it?

A. By limiting the boats and taking off some boats. I mean the fishing boats. I said to the fishermen that we had more fish than we could handle. The contract with the fishermen stated 1200 fish per day. They were supposed to deliver, or we were compelled to receive, [81] rather, and we were supposed to pay them for that amount whether we received them or not, and we did, on the basis of 1200 fish per day.

Q. Mr. Berglund, from your experience would you state that this crew which was furnished by Chin Quong was competent and able at that time to handle and put up 2700 case of salmon per day?

A. No, they could never satisfactorily handle them.

Witness continuing: When we left there at the end of the season there were cases of salmon left there. I counted about 2,200, a fraction over; but it was impossible for me to get the exact amount. They were in cans, piled up on the floor, and in different places. 500 cases were in trays. They were in irregular piles so that I could not count them ex-

(Testimony of P. A. Berglund.)

actly, but I got what I consider a fair estimate.

Q. What was the reason that those cans were left there?

A. Some of them were already spoiled, commenced to stink, to smell; if there is a hole in the can the fish will soon spoil, and if it is piled in among the other cans they get spoiled. There was no need to pick them out when they were left there in the first place.

Q. Why were the others left there, those that did not smell?

A. Because they did not know the difference between a leaky and a good can.

Q. Who did not know the difference?

A. The testers.

Q. Who were the testers, Chinese or white men?

A. Chinese.

Q. Who was it left them there?

A. Well, of course, I admit that I had to instruct them to quit, that it was of no use. We were the last ship in the harbor at the time and it was getting late, and it would have been impracticable; in fact, he would not put on more than 7 or 8 men to move the camps. If everybody [82] had been working during the season we would not have had to delay matters any. They were going idle a big part of the time and would not assist in mending the cans, when they should have mended them. The cans were leaky. The principal part is to stop leaks on the top of the can. The cans that were left there were destroyed.

(Testimony of P. A. Berglund.)

Prior to the execution of this contract I had a conversation with Chin Quong, the plaintiff, concerning the character of the machinery which we had in the cannery; it was in the Hotel Manx, I think, in one place, and his own office on Washington Street, in San Francisco, I believe. He claimed that he knew about the cannery, and it was after this conversation that he signed the contract.

We ran two soldering machines during the season of 1910, but we had three soldering machines. The third machine was in commission so that it could be run; we used it for making cans. It was Manual's Patent, Manual's Soldering Machine, a spiral machine.

I recognize the photograph shown me as a correct representation of the machine in the condition that it was in in the season of 1910.

(This photograph was introduced in evidence and marked Defendant's Exhibit "A.")

(Witness takes photograph and indicates its mechanism.)

(Defendant also introduced in evidence other photographs representing the canning machinery in the cannery and the condition in which it was in the season 1910.)

(These photographs were marked Defendant's Exhibit "B.")

Witness continuing: The soldering machines in 1910 were new; they were just brought up to Alaska. We have used them during the season of 1911 and had no trouble with them. The capacity of each of

(Testimony of P. A. Berglund.)

these soldering machines, if properly handled, is easily 1500 cases per day.

The regulating of the heat of the burner was supposed to be done by the contractor's operator,—the soldering-machine man as he was called. [83]

Q. What effect has the frequent stoppage of the soldering machine on the heat of it?

A. By stopping it, it increases the heat while the cans are not running true; then they throw off the burners.

Witness continuing: If a competent man is in charge of the machine when the cans stop going true, he is supposed to stop off the burner, reduce the flame. If he does not it gets too hot.

The Chinese foreman up there was in very poor physical condition. He walked on crutches. When he came up there they had to carry him in. I was not in San Francisco when the ship sailed. I recognize the photograph shown me as the photograph of the Chinese foreman as he was at the cannery during the season of 1910. That is as he was after the run was over, after the hardest work was done.

(The photograph was introduced in evidence and marked Defendant's Exhibit "C.")

Witness continuing: I had a conversation with this foreman concerning the method in which his men were doing the work. He said, "All the same dead men," referring to his men. I called his attention to the poor workmanship that was turned out. I had more than one conversation of this

(Testimony of P. A. Berglund.)

character with him, quite often; I could not say how often it was. He was not in a condition to get around. I wanted to change the men from one place to another and it took him two days to get those men transferred to help soldering.

After the crew got to the cannery two of the men deserted and went to another cannery. They came back to us afterwards; they came back on the same ship.

We had to throw some fish away because we could not put them up and they got too old. Under the Government law and regulation we can keep fish 48 hours after they are caught, and before they are canned. [84] I cannot tell the exact number of fish that were thrown away. The bookkeeper kept a record of that. He is present here. The fish we threw away were good red salmon. The run of salmon up there during 1910 was between 1st and the 13th of July, and during the season of 1910 other than on those special days there was not a run of fish sufficient to can in any one day 2,700 cases. The trouble I am referring to occurred during that special time.

The fish when they were thrown away were on the lighters. We kept them approximately 48 hours before they would be thrown away.

It generally takes between 12 and 13 fish to a case, and that is true of the fish that were running that year. When the fish are running in the Nushagak river and its tributaries we can rely with certainty upon a fisherman and boat getting so many fish each

(Testimony of P. A. Berglund.)

day. The fish are caught by gill-nets. There are two men to a boat. Some of the fishermen went 3 miles from the cannery to fish, some of them went 6 miles; different men had different grounds to fish in. If they cannot get fish in one place they go to another.

There are a number of other canneries on the Nushagak River. So far as my knowledge goes, these other canneries were running to full capacity during those days of that year, but I did not visit those other canneries.

Q. Considering the character of the machinery that you then had, and the condition it was in, what was the capacity of that cannery?

A. 3,000 cases per day.

Upon cross-examination the witness testified: A description of the machinery that we had in the defendant's cannery during the season of 1910 is as follows:

We had three engines running the cannery machinery and one running an elevator to take the fish out; that means four engines.

Q. I mean more particularly the canning machinery itself?

A. We had four filling machines, three set-ups, and one auxiliary, [85] one iron chink, four topping machines, two can-washing machines, three crimping machines, three soldering machines, two can-body machines, three power presses, three foot-presses, three tin slitters. I am not positive how many tin shears we had—four or six, but the in-

(Testimony of P. A. Berglund.)

ventory will show what we had there, and I guess we can produce it. That is all that I can think of at present.

We had 600 or more coolers. I don't know how many wooden trays we had. It is better to refer to the inventory; that will show it.

Witness continuing: We had no unusual trouble with those filling machines during the season of 1910. There is no machine perfect. It was the business of the machinists to adjust the can filling machine.

If a machine is filling a can too full it depends as to whose duty it is to remedy it. Sometimes if the man who feeds the machine has too heavy a pressure on top of the fish it will cause too full a can. On the other hand, if he has no pressure at all on the fish it will be too light. So it cannot always possibly be adjusted by the machine, it has to be with both parties. The cause lies with both parties sometimes. There is an iron fork in there. Its tension can be adjusted but sometimes they have not enough fish for it to have a tension on because of lack of fish in there. If the machine is filling the cans too full, and it is the machine's fault, it is the machinist's duty to remedy it. If it is the man's fault who feeds it, it is his duty.

We always have a certain gauge for the stroke of the plunger. It is adjustable. The machinist has to adjust that, and he adjusts it at the beginning of the season. I do not believe we ever change the adjustment in that. The machinist adjusts the

(Testimony of P. A. Berglund.)

plunger at the noon hour to see that it is right, and sharpen the knives.

We did not have any trouble during the season of 1910 by reason of the fact that these cans were filled too full because of the plunger [86] being improperly adjusted.

I have been a cannery-man 13 years, and my business prior to that time was a shipwright. I had been a fisherman for four years previous to that, and I have been a cannery superintendent for 11 years for this same company. I never worked for any other company as superintendent. I built the cannery and installed the machinery during these other two years. I can make a can now, with a hand seam. We made all of our cans when we first started up in Alaska by hand. The auxiliary filling machine is used for a standby in case these machines should break down.

Mr. McGregor was present when I had a conversation with Chin Quong prior to the execution of this contract with respect to the sufficiency of the machinery in the cannery. We represented we had three filling machines set up and two soldering machines. We did not represent to Chin Quong that we would erect for the season of 1910 three lines of canning machinery.

Q. You say you installed two new machines in anticipation of the season of 1910; how many machines had you before that?

A. We had two machines down in the cannery and we had one upstairs.

(Testimony of P. A. Berglund.)

Witness continuing: The one upstairs can be used anywhere we require it. I never required it in the season of 1910. There were two solder machines downstairs in the cannery, and the other was used for floating cans in the can-shop.

The COURT.—Q. What was the usual output of that cannery?

A. With 140 men we used to come up as high as 2,900 cases, but, that was in former years.

Witness continuing: This was with three filling machines and two solder machines. We never had any more than two solder machines in that cannery at [87] that time. I don't remember the exact number of cases a day but I think we have the Bathroom Account that we can produce, as to what was put up there. I think it was somewhat over 2,900 cases. I think 59,000 cases was the most we had of annual output during former years. I don't remember the exact number of cases we got in the year 1909. We had only 90 men that year. The pack for 1909 was somewhat over 40,000. I believe our books will show that, and they are here. I cannot remember how many fishing days we had in 1909. The books will show how many days the boats were out fishing.

These topping machines were not combination toppers and crimpers, but the toppers and crimpers were separate. This is regarded by cannery men as up-to-date cannery machinery.

The COURT.—Had you ever had to throw fish away before 1910 because of inability to handle them

(Testimony of P. A. Berglund.)

as they came in? A. No, sir.

Q. You had always been able to pack every fish that was brought in?

A. I would always curtail the fishermen so I could figure on how much I could put up. They generally filled the contract and over; that is the guarantee.

Witness continuing: The last year before 1910 when we had 140 men in the cannery was, I think, in 1906, if I remember right. The Chinese guaranteed only 2,400 cases that year. We had less equipment. I think they reached 2,900 cases, and that year we were prepared for 50,000 cases for the season, and were through in the middle of July.

These can-body machines were located one downstairs and one upstairs. The one downstairs is called the Johnson machine; and the one upstairs is called the Troyer-Fox machine. The latter was upstairs during the entire season of 1910. We did not have any trouble with the can-body making machine in 1910, except the man feeding it did not know how to operate it. It takes quite a while to break in a man to feed [88] in a body machine, especially when not skilled before. This machine was used one season before in our cannery. It was brought up in the year 1909, in which year we had two can-making machines. We did not have any trouble with the machine in 1910. Our machinist worked in and about that machine a good deal during the season of 1910 when it was necessary to adjust it. The capacity of both machines depends on the expert feeder. If a man can feed them fast enough

(Testimony of P. A. Berglund.)

we can run 100 cans a minute. The Johnson machine ran up to 110 the year previous. In the 1910 we had to slow down to 80 and 90 and so forth. We had to slow down the Troyer-Fox machine quite a little too. We did not overload these machines in 1910.

Q. It is possible though to speed up one of those machines so that it will not do as good work as if it were running slower?

A. Yes, provided the operator cannot operate it fast enough to put the cans in the machine. If he misses too many there will not be a gain by it, and sometimes he puts in two sheets at one time.

Q. Even if he could feed it as fast as possible, would it not be better to slow the machine down so as to do better work?

A. It will be if it goes to the extreme, if you can do better work there.

Witness continuing: The solder-pan of the two soldering machines in the cannery was 6 feet inside where the solder was floating in, and about 10 inches wide. It had a spiral feed. That does not include the spiral though, the width of it. The pan and the spiral are two different parts. I think the foreman can answer to the weight of the solder in that soldering pan. I don't remember exactly. It depends on how full they kept the solder-pan. It depends on how the Chinamen wanted their machine I don't remember now how much we put into the solder machine when we first started the pan.

There were six oil-burners there under those two

(Testimony of P. A. Berglund.)

soldering machines [89] in the cannery. They were installed in the machines before they came to Alaska by the Astoria Iron Works. Our machinists installed the machines in the cannery, and the foreman and his helpers. The only changes that we had made was that in the prior year it was a coal-burner; we burned coal under the soldering-pans, and we installed the latest of the Clark oil-burners; it was supposed to be an improvement.

There was no difficulty in keeping that body of solder hot if it was attended to properly. To attend to it you just had to light those burners and regulate them. If they could not take away the cans at the ends of the chutes so they had to stop the machines and the burner was still burning, if they did not close them off they would cause too great a heat on the solder, and that makes poorer work and would splash the solder.

We could adjust the speed of those cans through the soldering machine according to our wishes, from 100 to 120. We could regulate the speed of the engine by the governor and we could regulate the speed of the machine by the pulleys, if it was necessary. We run them according to the capacity of the men.

When these cans ran through those soldering machines and to the test kettles they developed many leaks. I counted as many as 19 stop leaks in one cooler. A stop leak is a leak on the top of the can; that is supposed to be soldered up by the stoppers. These are the men who are supposed to solder up

(Testimony of P. A. Berglund.)

the vent-hole when it goes into the cooler. That process is called "stopping."

There was no difficulty in the cannery, to my view, due to these soldering machines in any respect. The cans passed through the molten solder at the rate of 110 or 120, according to our wishes. We could have it less or more as it would have been required. We would be required to adjust the heat accordingly.

There are 48 cans in a case.

The biggest portion of the fish thrown away between July 2d and [90] July 13th, 1910, were thrown from the lighters. There were three lighters. I don't know the exact percentage. One day there were thrown away about 60,000 fish from the lighters.

Q. They were not delivered to the cannery?

A. They were delivered in the lighters to the cannery, but I had to take them out an—

Q. (Interrupting.) But they were not put in the fish dock of the defendant? A. No.

The COURT.—Q. Do I understand that you never on any occasion had necessity of throwing fish away because they could not be used up—any previous year?

A. I never had any big occasion. It might happen as to a small item; it might have been delivered from a boat that was out a little longer than usual; it has happened as to a little, yes.

Witness continuing: The biggest pack we ever made in that cannery during the time I was superintendent was 59,000. We never packed 66,000. We had 140 men during two years, and we never

(Testimony of P. A. Berglund.)

made 66,000 cases. We never had the fishermen out. According to the fish contract with our fishermen we were bound to accept from the fishermen 1,200 fish from each boat. I could take more if they caught the fish, but I could not reduce them to under 1,200 fish a day. I don't know that all of them delivered 1,200 fish a day at the cannery between July 2d and July 13th, but most of them did. I don't remember the exact number of boats I had fishing on the different dates, because I changed off whenever I thought it was necessary, or sent out boats. Whenever I saw I had too many out fishing I took some off. Altogether there were at the cannery 33 boats. I would not dispute that on the 11th day of July we received only 8,027 salmon fish at the cannery. I guess the books are correct. 8,000 fish would not pack more than approximately 600 cases. [91] 24,098 salmon would enable the plaintiff to pack about 2,000 cases. 27,244 salmon were sufficient to have packed pretty close to 2,200 cases.

Q. And on the 9th day of July, 1910, it appears that the defendant delivered at the cannery for the plaintiff to pack 23,027 fish; how many cases would that have enabled the plaintiff to pack?

A. Between 1,900 and 2,000 cases.

Q. That is on a basis of a calculation of between 12 and 13 fish to a case? A. Yes, sir.

Q. Then, it was not true that on the days before the 11th and the 12th you had fish accumulated there?

(Testimony of P. A. Berglund.)

A. I don't know. We had plenty of fish left every night.

Witness continuing: We packed more, I presume than 600 cases on the 11th. The bath-room account will show that. I have not in my head every day just what we did pack, but we had more fish than we could pack. I have testified on direct examination that I had sufficient fish to enable the plaintiff to pack 2,700 cases of fish per day provided I had all the fishing boats fishing. I was not allowed to throw the fish away. There is a fine for throwing fish away, to destroy food fish, there is a penalty. I did not have all the boats out fishing, of course. I did not know that they were not unable to get away with the fish. I supposed they were able to. I think I directed the fishermen to go out and get more fish whenever we were cleaning up in the cannery. I was afraid of getting too much and we would have to throw them away.

Q. Did you have any ground for your fear when there were only 600 cases delivered there in one day?

A. We had more fish on the dock; we had plenty of it. The dock don't hold so much; it holds several days. The lighters we had fish in. We elevate them up into the fish-house; that is done easily. We can [92] keep a reserve in the scows from one day to the other.

Q. But on the 11th, 12th, 13th and 14th, it appears that you got respectively 24,098 fish—which was not sufficient to pack over 2,000 cases; on the 13th you got 23,523, and that would be a little over 2,000 cases,

(Testimony of P. A. Berglund.)

and on the 14th, you got 17,048 fish. Now, on the 11th, when you got only 600 cases of salmon, didn't you take your fishermen off the limit?

A. I could not do it when the fish was expected every day. I did not know when they went out if they were going to catch the fish or not. How do I know ahead of time?

Witness continuing: I restricted them the next day, whenever I saw it was not sufficient.

Q. You did it here for a period of 7 days. Didn't you not see that by sending out your fishermen during that great run of fish that you would accumulate enough to pack 10,000 or 15,000 cases?

A. I don't know what you are driving at. I don't really understand the question.

Witness continuing: I know the habits of the fish that were caught for the Nushagak cannery of defendant and have had experience for 13 years. I was never compelled to put fishermen on a limit, because the Chinese contractor got away with the fish, but this time I did not need the fish and could not use them. Sometimes the run lasts for 20 or 25 days. I could not tell how long it was going to last. The run of the fish in the waters adjacent to the Nushagak cannery has been as late as the latter part of July, up to 30 days for a fairly good run. The crest of the run was between the 2d and 13th of July, 1910.

Q. And it appears from your own book here, that on the 8th, 9th, 10th, 11th, 12th, and 13th you restricted the catch of fish for this cannery. Now,

(Testimony of P. A. Berglund.)

what do you say, what is your explanation for that conduct? [93]

A. Because we had too much; we could not handle any more.

Q. Well, I have called your attention to the fact that on the 11th day of July you only had 8,027 fish delivered at that cannery.

A. Yes, but you must remember we had fish on hand from days before.

Q. I called your attention to the fact that on the day before there were 27,244 fish delivered into the cannery; that was not sufficient to pack more than—

A. We had all the fish. What the books show makes no difference; and we had more than we could handle during those days.

Q. Do you contradict your own books?

A. Well, I saw it with my own eyes.

Q. You have testified that as to every day between the 2d and 13th of July there were sufficient fish actually delivered into the fish-bins of the company to enable the plaintiff to put up 2,700 cases of salmon.

A. I did not say that.

Q. I understood you to say that on direct examination.

The COURT.—Your counsel asked you, in a very general way, it is true, during that run did you have sufficient fish delivered to enable this plaintiff to pack 2,700 cases a day, and you said yes.

A. My meaning of that was that I had at the beginning,—I thought I explained that before—until I saw we could not get away with that many, and then

(Testimony of P. A. Berglund.)

I had to reduce it to just the amount we could handle.

Witness continuing: I found that we could not handle the fish after we had tried it several days, and the Chinese boss *asked me to the* three machines every day, and we got piled up with the cans on the floor; in fact, we lost a whole lot by it, by trying to run too many machines. They could not get away with them, and as soon as they got [94] blocked it stopped them; it was slower work. We could have done better with two machines than by running three.

We only ran two lines of machinery because they could not do any more; they could not handle any more fish at the bath-room. We generally ran three lines of machinery in the forenoon, although it was different according to the Chinese boss' request. We asked him in the morning, generally, what he wanted, and he insisted always to run the three, and we finally persuaded him to run only two, as they were able to handle it and turn out better work. If a man tries to do more than he can handle, he will only be destroying property.

We sometimes shut down more than one line of machinery in the morning, when they could get away with the fish on hand. We started up after the noon hour, as soon as they cleaned up in the bath-room so that the cans would not get spoiled.

The crew went to work in the morning sometimes at 4 and sometimes at 5, according to the time the boss got them out. We would try to start as early as possible. We generally tried to start them at 4

(Testimony of P. A. Berglund.)

o'clock in the morning, if they would come out, but we did not always start at that time.

We ran three lines of machinery whenever they wanted them, whatever time he could get them out. He never got them out on regular time. As superintendent of the cannery, I insisted on regularity in turning out the men, but what good did it do? We ran the soldering machines whenever the men got out there and started them,—four o'clock if they could; sometimes it was a little after 4, sometimes it was 5 o'clock. We tried to start it at 4 o'clock. His instructions were to be out there at 4 o'clock sharp. Sometimes they were there at half-past 4; some of the men were and some were not. There was always one or two that detained the whole thing. One man sometimes would hold up a whole line. [95]

The engineer, of course, started up the engines in the morning. The Chinese foreman is supposed to place his men in the positions. I did not hire those Chinamen, and I did *not what* they were hired for. When I told them to do anything, so and so, they would say, "I am not hired for that. I am not paid for that kind of work." I had to go to the Chinese foreman to find out what they were hired for. I would suggest to the Chinese foreman what to do for the day. I gave the word to start the cannery in the morning.

The three lines of machinery ran until they got blocked. Sometimes it was stopped every 5 minutes, the soldering machines they could not get away with them. We were doing our best to make the cannery

(Testimony of P. A. Berglund.)

run between half-past 4 in the morning and until noontime. We had to give them breakfast and lunch, and in the forenoon we would stop for 5 minutes to give them a little recess, and give them a little lunch, both in the morning and afternoon. Sometimes we would stop during the noon hour half an hour, and sometimes an hour and over to clean up in the bath-room.

At half-past 12 or 1 o'clock we would start up again and work until 6 o'clock. That was the rule. They varied a little; sometimes to clean up the hoppers and the fish that had been cut off; it would sometimes run over. That would depend on the foreman. He watched that part of it. Sometimes it might be 5 minutes over, or 5 or 10 minutes, or something like that. We could not very well adjust it exactly.

We stopped the can-filling machines at 6 o'clock in the evening and for the day. The bath-room Chinese crew had to be in the bath-room from that time until 12 o'clock, and sometimes until 2 o'clock at night, before they cleaned up in the bath-room. They would turn out the next morning a little later than 4 o'clock.

Q. Did you keep up this method of running your cannery during the entire season that way—the way you have described? [96]

A. My method has generally been, in former years, we would start in at 5 o'clock and run only to 6; but the Chinese boss insisted upon starting earlier to be able to fulfil his contract, and, of course, I wanted to see him accomplish what he agreed to. Of course, it was up to him. I never insisted.

(Testimony of P. A. Berglund.)

Witness continuing: I was not altogether indifferent in the matter. I wanted to put up as much as possible, but the trouble is, I did not know which would be best. If you work the men too long until they get fagged out and tired out, there is nothing gained by it. I have always found the best results by shorter hours, if you have good men who are willing to work. But I could not very well contradict our Chinese foreman about the time.

Under the contract I was made superintendent over the Chinese as well as over the white crew. I gave the instructions to the Chinese boss, and to my foreman too, of course, the white foreman, Mr. Young, if I left the cannery sometimes.

The pack overran the bath-room account a couple of hundred case for the season. In the 40,000 cases packed the year previous it was 300. The bath-room account is the number of coolers put into each retort on one end, and on the other end they keep the number of retorts for the day. They always jibe. The bookkeepers take the tallies in the evening, and if they do not jibe they have to correct them. The bath-room account overran, because we have a little different-sized coolers. Sometimes they vary a little bit. It is pretty hard to have them exact. Both the bookkeepers as well as the salmon cooks go and count them up several times during the day to see how they do average. We had three different sized coolers, but not a very great difference. The exact amount that the pack overruns the bath-room account is shown

(Testimony of P. A. Berglund.)

by our books. I have not got that clear in my head exactly.

Q. If the law required you not to keep salmon over 48 hours— [97] did you testify you could not keep salmon over 48 hours? A. Yes, sir; I did.

Q. Then, in the period of the 8th, 9th, 10th, 11th, 12th, 13th, and 14th days of July, if on the 11th day of July you only delivered sufficient fish to the cannery to have enabled the plaintiff to pack 600 cases, and on the day before 2,000 cases, and on the day before that a little over 2,000, could you have any reserve fish after the 11th day of July?

Mr. GREGORY.—Now, may it please the Court, for the information of counsel, I will state that the figures that he has read are not correct. We have the bookkeeper here, who will tell us the exact number of fish brought in and the exact number of the fish left over. The figures you are quoting there are not correct.

The COURT.—I thought they were taken from your book.

Mr. GREGORY.—No, indeed.

Mr. THORNTON.—They are taken from the books.

Mr. GREGORY.—We intend to develop the case along these lines, if your Honor please, by the bookkeeper.

The COURT.—But he has the right to assume that your books are correct.

Mr. GREGORY.—But our book is not in evidence; we intend to put it in evidence.

(Testimony of P. A. Berglund.)

The COURT.—I thought you said, Mr. Thornton, you were examining from their book?

Mr. THORNTON.—I am, if your Honor please. That is the book handed to me.

Mr. GREGORY.—But the difficulty is this, if your Honor please, that there are three accounts in the book, and he has taken those figures only from one.

The COURT.—He is entitled to assume that what he finds in your books is correct. [98]

Mr. GREGORY.—Yes, your Honor, but it is time entirely thrown away because we will show when the time comes, that these figures are entirely incorrect.

The COURT.—I don't know that you will be permitted to show that your books are incorrect.

Mr. GREGORY.—But, if your Honor please, it is a question of his taking one out of three pages. We have not vouched for what he has asked the witness.

Mr. THORNTON.—The account is "Fish Deliveries for 1910."

The COURT.—Well, I will wait and see what you show. But I think he has a right to proceed on the theory that what he finds there represents the fact.

I say that with the machinery and the appliances that we had in the cannery that that was a 3,000 cases a day cannery, with 140 men, but I would not say with those kind of men, but if they are all skilled good men, yes. We had never done so with the three lines. I never happened to have enough men or enough fish for that purpose. At the time that we did that we did not have the capacity that we have now.

(Testimony of P. A. Berglund.)

The leak-menders furnished by plaintiff in 1910 were very slow; they did not seem to be experienced men. I have seen some of those Chinese before in our cannery. A few were competent, but a very few. There were no first-class men, but there were a few fairly good men, about a dozen of them; that is, in the bath-room gang, the hand-solder men. Including all of them I do not believe it was that many, but about that I should say. The solder-machine men were very poor.

The burners in the solder-machines gave plenty of heat. They are there yet in the same way and have not found any fault with them. I cannot see anything wrong with them. They were not placed too low, and the pan was not placed too high. They are all right according to my ideas. I have seen other canneries but I am not so familiar [99] with them as I am with our own. I have seen the H. P. Johnson Cannery. Mr. Johnson ran several canneries on Nushagak. The Clark Cannery has 6 filling machines.

Kep Yung, the Chinese foreman, requested me to fix one of the bars in one of the soldering-machines, to change the bar, and they were changed several times, according to his request. One of the bars was bowed. I am not positive that Kep Yung requested me to permit him to go upstairs and take the bar out of the soldering-machine upstairs in the cannery and put it in the soldering-machine downstairs. Whether he did or not I could not say. He was sometimes talking about wanting to try it, and I said, "All

(Testimony of P. A. Berglund.)

right, you change the bar to suit yourself. We will change it if you want to." These bars are interchangeable. The three soldering-machines are exactly the same size as to the solder parts, and the bars were so that they could be changed from one machine to another if it was necessary. They were all the same make. The bar guides the can along the solder. It is adjustable so you can run the can in deeper, or less, according to your own judgment. If the bar is dirty the spiral feeder in that soldering-machine has a tendency to jerk up and pull the can out of the solder. If they do not clean the bar it will. If the fish comes on the solder-bar and burns on and it gets sticky, there is such a tendency. Sometimes the tops will come off in the molten solder if it is a dented can, or dropped, or maybe coming from upstairs in that condition—dented in the operation, it is apt to come off in the solder-machine or in the machinery. All these cans should by right be picked out, and instructions are given to that effect, but they are very often let go through, and when they come in the solder-machine they will come off. They are rolled through the solder trough. Only the edge of the top of the can is covered with solder, about $\frac{3}{8}$ ths of an inch. It goes in on about a 30° incline, with the end down, and as it goes through it rolls so as to solder the edges. [100]

The fish that come out of the can they will come out on the bar. Quite a few tops came off these cans in the season of 1910. I attributed that to the careless handling all through. We had the same

(Testimony of P. A. Berglund.)

crimpers for a good many years. We get the same kind and fix them up every year. We had wheels up there and fixed them up and made new ones. We had castings up there and turned out new ones. It is what they call the rotary crimper. It is common and well known. The up-to-date salmon cannery uses a combination topper and crimper, except the packers. The packers use a patent on the Jensen machine, which is a combination. All the Alaska packers could not buy the Jensen machine while they had the patent on it; so most of them have been using the Letson-Burpee.

Upon redirect examination the witness testified: We changed these bars at the request of the foreman. The change did not do any good; it was a detriment.

The Chinese foreman regulated the hours at which the men went to work. We consulted one another. We did not call the men out; the Chinese foreman did. We blew the cannery whistle. The cannery was started as soon as the men came into the cannery ready to work. We often had to wait for the men to come in before we would start.

I got the can shown me from Mr. Johansen. He picked it out in my presence at the Nushagak Cannery with the fish in it, and I cut the bottom and took the fish out. The closed end is the top. The can is in the same condition now as it was when I picked it up, except for the fish. I picked it out from one of the coolers at Nushagak, in the presence

(Testimony of P. A. Berglund.)

of Mr. Johansen. He said he had seen several, as he said himself.

(This can was thereupon introduced in evidence. Defendant's Exhibit "D.")

Witness continuing: I believe the can has met with an accident, to a certain extent, [101] but not the solder that is poured inside. It has all gotten in there by the men, with the intention of soldering up that hole.

We paid the fishermen \$18 a day.

I saw 19 leaky cans in one cooler, in which there were altogether 144 or 146 cans. These were leaky from stop leaks.

The Clark oil-burner is recognized as an efficient burner in the canneries in Alaska. I think all the canneries have them so far as I know. I don't know of any other make. The oil-burner is supposed to be better than the coal-burner,—the latest improvement and the best.

We had to slow the machines down from time to time because they could not get the cans away from the chute and could not take care of them in the bath-room.

Q. From first to last, will you state whether or not there was any difficulty with those machines in the cannery, so far as this output was concerned?

A. Not the slightest.

Q. Was the difficulty entirely, if there was any difficulty, caused by the slowness and the negligence of these men? A. Yes, sir.

Q. Now, referring to the number of fish, com-

(Testimony of P. A. Berglund.)

mencing with the 1st day of July, and ending with the 13th, was there any day upon which you did not have a surplus of fish at the end of the day?

A. No, sir, we always had plenty of fish in the evening, and could put up more if we could.

Witness continuing: One of those machines is down at the Vallejo Street Wharf, in the same condition that it was in in 1910.

Upon recross-examination the witness testified:

I cannot see any defect in the seam of this can. (Defendant's Exhibit "D.") I do not believe it was a leaky seam originally. The can [102] is not defective in the seam; there is too much solder on the side of the seam. I have seen quite a few cans jammed like that. Sometimes they run trucks against them; sometimes they drop them. This kind of can is not put on the market but thrown away.

(At this point the Court stated that he had become satisfied that under the pleadings the evidence on behalf of plaintiff already introduced tending to show inadequacy or the improper condition of the implements and the machinery which were afforded the plaintiff in carrying out the contract was inadmissible, and that he should therefore eliminate the evidence put in by plaintiff upon that subject in the cross-examination of Mr. Berglund, and also in the testimony of Kep Yung, and this evidence was stricken out.)

[Testimony of D. A. Young for Defendant.]

D. A. YOUNG, a witness on behalf of defendant, being first duly sworn, testified as follows:

My age is 31 years; residence Astoria, Oregon, and my business, canning foreman. I have been engaged in the salmon canning business 13 years, and have been employed by the defendant 9 years. I was at the defendant's cannery during the season of 1910 in Alaska.

I was in San Francisco when the ship left in April, 1910, and counted the number of men who were furnished by the plaintiff. I counted them aboard the ship "St. Francis" by taking them all out of the four Chinese holds and on deck, counting them one at a time as they came out on deck and returned. I counted 139 men, including the foreman.

Q. Did you have any conversation with the foreman as to why there were not 140 men there?

A. I did.

Q. And what did he say?

A. He said there were 140. I said there were only 139. He said that there was a Jap short in the count. [103]

Witness continuing: At that time the foreman was in his bunk; he was not able to get out. He told me he got hit here in San Francisco by a street-car. I don't think I saw him out at all on the ship. When we got to Nushagak he was packed out on a stretcher. I did not see him up and around the ship here in San Francisco. At the time he was taken off at the cannery he was crippled. He could speak

(Testimony of D. A. Young.)

pretty good English.

139 men did not work at our cannery, but two of them worked at another cannery. They came back to our cannery before we sailed. They came back on the ship. I don't know the efficiency of these two men.

The foreman during the canning season up there in 1910 was helpless. He was not lying in his bunk all the time. He would be carried over to the cannery sometimes; but when he got over there he would sit down most of the time in one place. The Chinamen carried him over on their backs.

These men—the Chinamen, the Japanese and the Filipinos—were not able to handle the output of the machinery. They were slow and careless. They first went back in the work down in what they call the bath-room. They were not able to keep up. Salmon commenced piling up on the floor and we had to slow down the machines.

The next place they were slow was in the testers. They were not able to pick the cans fast enough off the soldering-machines, and we had to slow down the machines. The machinist was told to slow them down, and he did it. I did it sometimes when the machinist was not around. They would run up to about 9 or 10 o'clock and then we would have to slow them down.

I had a conversation with this Chinese foreman as to the reason he could not handle the cans fast enough. He said he could not help it. He acknowledged that his men were too slow. He further told

(Testimony of D. A. Young.)

me that he had some good bath-room men here in San Francisco but they [104] ran away from him here, and he had to take what he could get. I cannot state the exact expression he used concerning these men as to their character.

He said he wanted us to slow down. He said they "no sabee." At times he would talk English and at times he would not.

I know the number of cases of salmon that were left there when the ship sailed for San Francisco. I counted 2,260 cases. They were left there because they were swells, most of them; they commenced spoiling. I do not recollect any conversation with the Chinese foreman about those. I did not count to see how many were swells. I know most of them were swells because we could see. We had them all piled. There were some good cans left among them. We left them because the Chinamen did not pick them up. We did not know the good cans were there until the day before we left. I heard the Chinaman state why these cans were left there; he said he got after the testers. That is all I know about it.

Upon cross-examination the witness testified:

The first slowness on the part of the men was in the bath-room. I was general overseer of all the cannery. I directed the Chinese crew with the superintendent. The first slowness appeared in this process down where they call the stoppers. They got behind first there, and when they got behind they crowded the men at the chutes, and they were not

(Testimony of D. A. Young.)

able to get rid of their cans, consequently the whole chute was blocked, and when that chute was blocked we had to slow down the solder-machines.

They do the stopping at the end of the chute, which I should judge is about 40 feet long; I could not say exactly. It has not got a great incline. After it leaves the soldering-machines we have what they call an endless chain. There is no incline to that at all. When they get down to the last 10 or 12 feet there is an incline, and we have a turn there that turns the can over horizontally, and from [105] there they take them out and put them on the cooler.

The men had trouble in taking the cans out of the chute and putting them in the cooler. When they were blocked they would naturally come back to where they took them out of the chute. The men stationed at the chute were slow men. A man has to be used to it if he is going to be quick. By the time they got used to it that season they quit, and we got some new men in there. We were breaking new men in there about every other day. The Chinese foreman put in the new men, but not at my suggestion. They refused to work there and he had to put some one in.

The COURT.—Q. I thought you said you were in control of those Chinese?

A. You could not control them. They refused to work and I could not do anything with them.

Q. They were generally bad and of no use in the

(Testimony of D. A. Young.)

world, I suppose? There were no good men among them, I suppose?

A. Yes, there were some, but they claimed they were not paid equally; some of them thought they were not paid the right amount of money, and they wanted to change about.

Witness continuing: I never saw a crew of that kind before, and never had any trouble like that with any crew before. I never had any trouble with any crew at all previous to this, nor lost any fish for lack of ability to put them all away,—not a single fish that I know of or remember. I cannot say that the bath-room crew were good.

Q. Then, you don't have the same opinion as your superintendent with respect to the sufficiency of the bath-room crew?

A. We had what I call about five fairly good men in the bath-room; outside of that I cannot say they were any good.

Q. He said there was a good crew in the bath-room. A. I cannot say that, no, sir. [106]

Witness continuing: In the process of canning the fish, the first time it is tested in the test-kettle. The next test is after they are put out in the warehouse, and before they are piled up; then they are tested before they are lacquered, and after they are lacquered they are labeled and then they are tested afterwards before they are cased up. In the progress of that process they are tested in the test-kettles. What are called hot leaks they are sup-

(Testimony of D. A. Young.)

posed to pick out after the first cooking. There is no other very severe test that these cans are put to. I never heard of a mallet test in the bath-room subsequent to the first cooking. There is on what they call the do-overs but not on the regular salmon run. It is done on the do-overs; never on the first cooking.

Q. Then, later, immediately after that operation, the bath-room crew reverse their mallets, and there is a brad or awl on the other side of the mallet, and he makes the vent-hole then—is that right?

A. He does, yes, sir.

Q. Did you ever see in any other cannery the mallet test made? A. I never did.

Witness continuing: I do not know as a matter of fact that the mallet test is the most important test a can receives during its progress through a cannery. I never have seen it, only on the do-overs; they use it there; that is all.

The principle underlying the first test is to pick out the leaks. It is a hot-water test. The test made immediately after the cans are cooled, after the second cooking, is with a piece of steel about 6 inches long. This is to pick out the leaky cans. I can test myself. I have used the mallet test on the do-overs but not in the original progress of the can through the cannery, coming out of the first cooking. [107]

There are three tests made after the first cooking, or the retorting of the cans, and after they are put on the cooling-platform from the second cooking. They are tested before they are piled, after they are

(Testimony of D. A. Young.)

taken out of the coolers, and then they are tested before we lacquer them, and then they are tested again before they are boxed up. We do not test them before they are labeled.

I have worked in other canneries than this one.

We subject the do-overs to the mallet test because there are lots of light cans there and they won't swell out, bulge out. We give the do-overs the mallet test after they are taken out of the first cooking. The do-overs are cooked once; that is the re-cooking. That makes three cookings in all. It is after the third cooking that the do-over is given the mallet test.

We give 212° of heat to a do-over in cooking it the third time. It has 212° on the second cooking.

The testers in the cannery were bad. I think the defendant made that year 44,000 pack, if I remember right. The cans were all tested by the Chinamen. The alleged pile there in the cannery which contained good cans were tested. They picked out the good ones when they thought they were bad ones. The good ones are still in that pile. They were not properly tested. I cannot say as to any complaints as to the character of our pack from the parties to whom they were sold. If they left a large number of good cans in this small lot of 2,000, they would be very likely to leave a large number of improper cans in the entire pack, and this evidently would have brought complaints from the purchasers. I have never heard of anything of that kind.

I worked for P. H. Johnson, and the Alaska Pack-

(Testimony of D. A. Young.)

ers' Association in San Francisco, for three years. During all that time I never saw a crew made up as this one was. I say that there were four or five men in the bath-room who were good men. Most of the rest were [108] unexperienced and inefficient. Some of them told me they had never been employed in a cannery before; they told me they were up from around Sacramento here, working on farms. It was generally a very bad crew. During all my experience in a cannery I have never seen an instance where they had been compelled to throw away fish that were spoiled because they were not able to take care of them all.

Upon redirect examination the witness testified:

There were about 300 men employed in the bath-room. When I said there were four or five good men I meant of the bath-room crew. There were some good men outside of the bath-room in the other departments.

[Testimony of H. Jonsson, for Defendant.]

H. JONSSON called as witness for the defendant, being first duly sworn, testified as follows:

I am thirty years old; I reside at Astoria, Oregon; and I am a bookkeeper. I have been employed by the defendant for six seasons, and was their bookkeeper during the season of 1910. I was at their cannery on Nushagak Bay that season. I have books in the room which will show the total number of cases packed by the defendant company at its cannery in the season of 1910, and I have made a compilation from those books.

(Testimony of H. Jonsson.)

The total number of cases which were packed at the cannery during the season 1910 was 44,619. The total number of cases sent from the cannery to the market was 42,574.

The difference between these two figures were left over in the cannery, because they were leaks.

Q. Will you state what, if anything, you know about these cans which you have designated as leaks and which you left there?

A. I know that these cans were picked out by the testers from the pack during the season and were picked out as leaks and not mended. That is the reason they were left there.

The COURT.—Q. And there were no good ones left among them? [109]

A. I could not state as to that.

Q. How do you know they were leaks?

A. They were picked out as leaks by the testers.

Witness continuing: The Chinese foreman did not tell me anything about that lot.

Commencing on the 1st day of July, 1910, the total number of cases packed each day, down to and including the 14th, was as follows:

July 1st.....	1,114
2d.....	1,650
3rd.....	1,580
4th.....	2,298
5th.....	2,082
6th.....	2,525
7th.....	2,522
8th.....	2,327

(Testimony of H. Jonsson.)

9th.....	2,484
10th.....	2,288
11th.....	2,231
12th.....	2,202
13th.....	2,066
14th.....	2,700

The 2,700 cases packed on the 14th were not packed entirely by the Chinese crew; they had all the assistance we could give, the white men working in the cannery and also a great many native Indians.

Q. Commencing on the 1st day of July, 1910, will you tell the number of fish delivered at the cannery, down to and including the 14th, and also the number of fish that were over at the end of each day?

A. That is shown on the books.

On the 1st we received 38,593.

On the 2d we received 44,261.

On the 3rd we received 41,746.

On the 4th we received 37,462.

On the 5th we received 23,775.

On the 6th we received 52,236.

On the 7th we received 57,646.

On the 8th we received 34,812.

On the 9th we received 33,027.

On the 10th we received 27,244.

On the 11th we received 8,027.

On the 12th we received 24,098.

On the 13th we received 23,523.

On the 14th we received 17,048 [110]

Q. State now what was held over or left over at the conclusion of each day's pack.

(Testimony of H. Jonsson.)

A. On the 2d we had 47,864.

On the 3rd we had 55,860.

On the 4th we had 59,572.

On the 5th we had 49,597.

On the 6th we had 68,083.

On the 7th we had 91,979.

On the 8th we had 93,041.

On the 9th we had 93,310.

On the 10th we had 86,804.

On the 11th we had 61,081.

On the 12th we had 51,429.

On the 13th we had 41,202.

On the 14th we had 25,500.

Witness continuing: Some of these fish were thrown away. On the 8th there were 23,619; and on the 9th there were 8,079. They were thrown away because we had too much fish on hand and we could not pack them.

At the commencement of the season we had 33 fishermen's boats working for the cannery, two men to a boat. They are paid three cents for each red fish. We have to furnish them a guaranty that if we take any boats off and take a man in the cannery we have to pay them for 1,200 fish,—\$18 per day each, or \$36 for the boat. Outside of the 33 boats we had other reserved boats which we could have called in if we needed them. We had 9 boats at the Egushik Station and 14 boats at the Koggiung Station, making 23 altogether. We did call on these boats, but we did not receive any fish from Koggiung. We did not receive any fish from the 6th to the 15th,

(Testimony of H. Jonsson.)

because we did not need them.

Koggiung is about 70 miles from Nushagak and is another bay. The fish are towed over from Koggiung to the cannery by steamers. If the cannery did not have sufficient fish to keep the crew working we could have brought fish from Koggiung.

On several occasions I had a talk with this Chinese foreman concerning the injuries he received. He told me he was hurt on a street-car in San Francisco. The car did not stop and he fell, or was struck by the car. When he told me these things he was in his bed, [111] crippled.

I did not go up on the ship from San Francisco. I left from Astoria.

Upon cross-examination the witness testified:

I worked for the defendant company as book-keeper five seasons. I have no assistant in Alaska. We had several tally-men. Torvwick, in the courtroom, is a tally-man. I kept all the accounts of the cannery that related to the Alaska work for the pack of the season 1910 and the cannery operations. We came back to Astoria after the season of 1910, about the 28th of August. I can't remember exactly the date. I came down on the steamer "North Star" I brought down the books and the records of the company with me and I left them in Astoria.

Q. What did you do then after that?

A. I straightened up the books and then the books were turned over to the Alaska Fishermen's Packing Company at Astoria. All the accounts are transferred into their books.

(Testimony of H. Jonsson.)

Q. You remained there, did you, in the employ of the company?

A. No, I came down to San Francisco to pay off the crew, coming down on the ship "Flint" and then I went back to Astoria.

Witness continuing: I know of the existence of an account between the plaintiff and the defendant relative to the pack of the season 1910. I have some knowledge of the copy of the account now shown me. It is a copy. I know the signature of Mr. McGregor, the president of the company. The item on the first page—31,698 salmon dumped—is the same salmon that I have testified to as having been dumped. It is precisely the same amount. There are two items there, the first 23,619 and the next one 8,079.

The item 36,600 salmon, account of limitation, means that those men were taken into the cannery. We had too much fish so we had to reduce the boats, and we had to pay for that fish to these men. [112] I have here the account showing the payment for 36,600.

Q. That 36,600 salmon, is that part of the default chargeable against this Chinaman by your company, that you claim there were 6,376 cases we did not pack of fish actually delivered?

Mr. GREGORY.—I object to that question. This witness is not called as to damages which we claim. The pleadings speak as to that matter.

The COURT.—The objection is overruled. This is cross-examination. He is entitled to know if the

(Testimony of H. Jonsson.)

witness knows what he has been testifying to.

Mr. THORNTON.—Q. Is that part of this default of 6,376 cases? A. I do not understand you.

Q. Was that 36,600 salmon actually delivered into the fish-bins of the defendant cannery? A. No.

Q. It never was? A. It never was.

Q. It never was put in the fish-bins?

A. No. The boats were not fishing.

Q. The boats were not fishing? The 36,600 fish were never caught were they?

A. They were never caught.

Witness continuing: The item 6,376 cases default on contract, at one dollar, \$6,376, means the difference if they had packed 2,700 cases on all those days from the 1st down to the 14th. We would have had that much more.

Q. You would have 6,376 cases more?

A. That was put up since I came down here.

Q. The 31,698 salmon fish that were actually alleged to have been dumped between the 1st and the 14th of July, they are a part of this default of 6,376 cases, are they not? Are they embraced in this default? [113]

The COURT.—Q. You know about the books don't you?

A. Yes, sir, I know about the books.

Q. Well, state whether they were or were not.

A. No, they are not brought in there.

Q. Then, in addition to the 36,600 salmon on account of limitation, and the 31,698 salmon dumped between the 1st and the 14th, the 6,376 cases are 6,376

(Testimony of H. Jonsson.)

cases more of salmon that we failed to pack, are they? A. 6,376, yes.

Q. That is, 6,376 cases more of salmon that we received between the 2d and the 13th of July, 1910, but which we did not pack?

A. You have not shown me any before there.

Q. You said that 31,698 salmon were not embraced in this default of 6,376 cases?

A. The salmon and the cases are not the same thing.

Q. But the number of salmon is rapidly reduced to cases by dividing by 13. I speak to you as a cannery-man, as a man familiar with your business. You have said that that is not embraced in this item down here; how many fish would be in 6,376 cases?

A. You can multiply it by $12\frac{1}{2}$.

Q. Multiply it by $12\frac{1}{2}$ and that gives you the amount, does it not? A. Yes, sir.

Q. I have asked you if the 31,698 salmon dumped, added to 36,600 salmon never caught and delivered, represent this default of 6,376 cases? A. No.

Q. You say that it does not, and that the 6,376 cases are in addition to the fish not caught and salmon actually dumped? A. Yes, sir.

Q. Then, as a matter of fact, you would have the jury understand— [114]

Mr. GREGORY.—Just a moment. I object to counsel arguing with the witness in this manner.

The COURT.—Proceed. The objection is overruled. I want to find out what the witness knows myself.

(Testimony of H. Jonsson.)

Mr. THORNTON.—Q. Then, you would have the jury believe that you delivered 12,000 cases and over of fish between the 1st and 2d of July and the 13th of July, 1910, which this plaintiff Chin Quong did not pack?

A. No, we did not deliver them in cases.

Q. I am not saying that you delivered them in cases, but you delivered sufficient to have enabled him to pack so many cases.

A. No, we delivered fish enough for him to pack 2,700 cases each day, from the 1st to the 15th.

Q. Does the addition, the sum total of the number of cases which he actually packed between the 2d and the 13th, taken from the number of days of that period,—12 days—multiplied by 2,700 cases, does that represent the 6,376 cases default? You have not got anything about 6,376 cases on these papers, have you?

A. The difference really amounts to over 7,000 cases.

Q. Over 7,000; but you have in effect testified here that it was 12,000 cases.

A. No, I have not.

Q. You said that 6,376 cases were in addition—

A. (Interrupting.) Then, I do not understand your question if that is the way you took it. I say that there were over 7,000 cases short of their contract on account of those days not packing up to the limit, 2,700.

Witness continuing: The fish were dumped from the lighters. They were never put on the fish-dock.

(Testimony of H. Jonsson.)

We had fish enough on the docks and we could not take them off. [115]

These 31,698 fish and the 36,600 fish that were not caught are not all the fish that the Chinamen failed to pack between July 2d and the 13th. There were some other fish thrown away from day to day but not in any big quantities. We have no account of them. We did not keep that account because there was nothing to keep the account by. Some of the fish got soft, and the man in charge of the dock don't let them go through.

Q. In other words, that amount is inconsiderable?

A. Yes, sir; the other amounts were—well, I could not just say. I have no idea how many they could have thrown overboard, but they were not kept track of.

Q. You have no idea then above and beyond the 31,698 salmon fish which you claim were actually thrown overboard? You have no idea as to how many more were thrown overboard, have you?

A. No, I have not.

Q. In other words, you could not swear as to whether another fish was thrown overboard?

A. Yes, I could swear to that. I seen some fish thrown overboard.

Witness continuing: I went by the cannery and I have seen the man throwing them overboard, and I never stood there and looked at him. All the fish I have any record of that the Chinamen failed to pack under their contract were the 31,698 fish dumped and the 36,600 fish that the fishermen did not catch. To

(Testimony of H. Jonsson.)

my knowledge the 31,698 fish are all the fish that were dumped between the 2d and the 13th of July. The 36,600 salmon were never caught.

Q. Did you say that that item 6,376 cases default on contract at one dollar—what is that made up of?

A. 6,376 cases—from the 1st up to the 13th, the Chinese crew did not put up 2,700 cases any day; they put up from 1,100 to 2,522.

Q. But you have charged off the fish that were thrown overboard [116] and you have made a charge for fish that were not caught, that you had to pay the fishermen for. Where does the other item come in?

A. The first item of the salmon on the limit, those men were working in the cannery. We took these men off and put them in the cannery to help the Chinamen, and we had to pay those men while working in the cannery.

Witness continuing: We have charged the plaintiff for those fishermen out in the cannery. The only way I can explain the item of 6,376 cases default on contract, at one dollar, is that those are the cases they did not pack during the period by not filling the contract daily. They only packed 2,700 cases one day, from the 1st to the 14th. On the 14th they packed 2,700 cases.

Q. Did he pack all the fish that were not thrown away, between that period, between the 1st and the 13th? A. All the fish?

Q. Yes, all the fish that were not thrown away?

A. I could not tell how much more was thrown

(Testimony of H. Jonsson.)

overboard, but I know there were 31,698.

Q. Your books show 31,698 were thrown away; now, did they pack all but that? A. Yes.

Q. Then, what is the figure 6,376 cases? If he packed all the material that he got, except 31,698 fish during the period between the 2d and the 13th of July, 1910, what are the 6,376 cases? The defendant does not contend that there was any default during any other period of the contract. What do the 6,376 cases mean?

A. That means that those cases were not packed.

The COURT.—Q. Well, is not that in the nature of a double charge, if they have charged him already with the loss of the fish thrown overboard and the loss of those they never caught? [117]

A. What they never caught is a matter of expense.

Q. I understand it is a matter of expense—the canning of the fish they had to pay for.

A. All the extra labor we put on, it was in the Chinese contract.

Q. Well, tell us what that item is, the 6,376 cases.

A. It represents the difference what he would have packed if he had kept the contract.

Q. What he would have packed if he had packed more, I suppose?

A. If he had packed the contract of 2,700 cases a day.

Mr. THORNTON.—Q. Have you anything on your books about the 6,376 cases? You kept the entire books of the cannery, did you not?

A. No, I did not keep the entire books.

(Testimony of H. Jonsson.)

The COURT.—Well, let us see the books and see what they have in them; I have not seen them myself. I think that is perfectly permissible.

Mr. GREGORY.—It was for this identical point, if your Honor please that we wish to file an amended answer. I came to the conclusion that this was a double charge, that is, that we could not charge for the fish that were thrown away and also for the cases. That is the purpose of filing the amended answer. We do not want a double recovery.

The COURT.—What is the account you have been examining about, the account they furnished the Chinese, as to what they were going to charge him with?

Mr. THORNTON.—If your Honor please, that is precisely it. Here it is (handing).

Witness continuing: I kept the book shown me. It is all in my handwriting. I received the information that went in there from the tally-books of the tally-man. I have those books here. These are the tally-books. This tally-man's name is Sharp. He is not here. The books are in his handwriting. We had several men there who received the fish. This [118] book is made by Torvwick; he is here. Torvwick did not tally all the fish; he only tallied a portion of them; he was tally-man down the river; but not at the cannery. There were several tally-men at the cannery. All the men who tallied fish during the season of 1910 were W. Sharp, the beach-boss—Gus Peterson, and I tallied some fish myself. I think Mr. Berglund tallied some of them. The

(Testimony of H. Jonsson.)

Chinese had no control of the tally of the fish, except as they might ask how many fish we have on the dock. They usually do ask how many fish we have on the dock. They have nothing to do with the tally. I tallied fish only on one day when there was a heavy rush. I could not tell just exactly how much we tallied in the cannery, but maybe 15,000, 18,000 or 20,000. We had most of the fish delivered to the Station and then towed them up to the cannery. I could not state exactly how many fish were tallied by Torvwick, over one-half I should judge. I should think between 65 and 75 per cent.

Said figures I have testified to are based upon the condition of these tally-books. These tally-books are the original entries and transactions, and my figures are all taken from them, and my testimony is actually based upon these particular tally-books. I made out the tally-books myself and the rulings in them. The tally of the fish is in the tally-man's handwriting. I know all these parties and recognize their figures and handwriting. These books were given to me in the ordinary course of business to show the number of fish delivered each day.

Witness continuing: We did not keep a box mailing-up account. We shipped the fish as soon as they were boxed up. The Chinamen nailed the cases together. We did not keep any account as to the number of box shooks that were converted into boxes. I did not have the Chinese contract myself and I had nothing to do with that part of it. That should have been kept by the foreman. I have the books

(Testimony of H. Jonsson.)

here from which this account [119] was made up when it was sent to the Chinese. I have the first account. The advance of \$14,000 I have not. The item of cash from P. A. Berglund was a bill paid for the doctor's services to the Chinamen. I have also an account for the native labor hired by the company to assist in this work. The account was charged to Chin Quong. Merchandise in Alaska is also my account. It is a store account. And two men 17 days each; that is also my account. They were not fishermen; they were men we got up in Alaska, white men.

Q. I would like you to point out in the book the items showing that destruction of 31,698 salmon, the amounts and the days of the destruction of the 31,698 salmon. A. Here is one item.

Q. What day is that?

A. That was on the 6th, from Koggiung.

Q. Just explain that please. I cannot understand it. Explain that entry.

A. This is the tally-book that I received of the men as to the fish. Here are the number of the men here, and the number of fish for each fisherman.

Q. Where is the amount dumped shown?

A. The total is here. And here is 1,000 on this side; it makes 8,079.

Q. 8,079 fish dumped?

A. Dumped from that lighter.

Q. What day was that?

A. It was dumped on the 8th.

Witness continuing: It was dumped at the order

(Testimony of H. Jonsson.)

of Mr. Berglund. I have the memorandum in my own books. That was on the 9th. That is the original book. The dumping was always done at the cannery. The scows were lying just outside the fish dock. Mr. Berglund must have been there [120] and gave the order. What is called the "beach-man" dumped the fish. There were 7 or 8 beach-men; none of them are here. We have a man here who saw the dumping. I don't think there was any man standing there counting the fish we dumped overboard. We received a scow, the fish was on there, and it was dumped overboard. We threw overboard all the fish on the scow. We knew the amount of fish on the scow. We kept the scows numbered. That is the only way we can keep track of that. I have the original book right here. Here is one, fish received on the 6th from scow No. 6, and here is the amount, 15,180; everything was dumped. I know some of the scows were dumped. I was down on the fish dock probably 4 or 5 hours a day looking after it. I get the books right from the captain when he comes into the fish dock. There is no one to prove that except to bring all the men here. All the fish in those lighters were thrown overboard. We had too much fish on hand, so much on hand that we could not pack it, and they were getting too old. And those were hot days up there too. My statement in there that that was dumped is based upon a report made to me by one of the beach-men, not by the captain. I got the books from the captain. When the steamer comes in I go down on the docks

(Testimony of H. Jonsson.)

and get the books. I know it myself. When the heavy run is on I keep track of the lighters going up so as to be able to tell the superintendent. The superintendent wants to know from time to time how much fish is on the dock. I make a memorandum right along so as to keep him posted as to about how many fish we have there. I cannot tell exactly. I keep track of them so as to limit the fishermen. We do not want to get too many fish. We try to keep about two day's fish ahead when there is a heavy run. I was not the tally-man that day and did not do any tallying on that day.

Q. How do you know that that fish was dumped?

A. I know we did not receive it on the dock. [121]

Witness continuing: This scow was lying right alongside of the dock, about 15 or 20 yards from the side of the cannery.

The COURT.—How would you know she had any fish on her at all?

A. I know it because I received the book from each scow, and I kept track of what fish there is lying outside from time to time when the heavy fish-run is on. We have to know how many fish we have on hand; we have to limit the boats; we cannot receive more fish than we can take care of.

Q. Does that often occur? A. Very often.

Witness continuing: That occurs every year. So far as I know we have never made any charge against a contractor before except for common labor. They always sent good men and experienced men. I cannot account for the fact that most of these men,

(Testimony of H. Jonsson.)

or the greater part of them, were bad men, except as to the bath-room and the testers. I used to work there and help them around there myself. I know in the bath-room how it was. The men in the bath-room were slow and could not get ahead with the work fast enough. I worked with the testers helping them out. In the other lines, in the unskilled labor, I don't really see that that makes much difference, but that is not in my line though to keep track of the men.

We might have dumped some fish before this season, but not any big amounts. We don't call it dumping; we might have to throw away some fish. You cannot help that. In every cannery they have to throw away some fish. I don't think, if the Chinese contractor kept his contract, and they threw away 500 or 600 cases a season, that they would be chargeable to the Chinese contractor. I don't see why they should be. [122]

I don't know that a Portland firm of Chinamen sued the Alaska Fishermen's Packing Company during the last few years on a similar labor contract, and I don't know anything about a suit by Ladd & Tilton, as assignee of one Sid Beck of Portland, and I don't know that their vessel, the "St. Francis" was attached.

I say there was a great difference to my observation in the way this contract was carried out and contracts in previous years, in the main work. The men could not do the work. They were too slow in the stopping. The cans were piled up and they had

(Testimony of H. Jonsson.)

to wait for the stoppers and, of course, that put everything back. We never had any trouble of this kind before, to my knowledge. Of course, I don't spend very much of my time in the cannery; I am the bookkeeper. I spent a considerable portion of my time on this occasion because everybody in the cannery tried to help out as much as they could. I was asked to do what I could and I did it. Some times I was down there for 2 or 3 hours at a stretch in the forenoon.

We did dump some fish this year. I could not tell how much. All that we kept track of was the fish that was dumped on those days that I have here. In the year 1911 there were just a few white fish dumped. There might have been some fish thrown away, but not any great amount of fish. I know that when we worked for other canneries we threw away fish—for two years. Of course, I did not keep track of the fish and had nothing to do with it. I have been the bookkeeper all the time. There was no great amount thrown overboard in other years. We could not keep track of that. They were thrown over from the fish-bins. These fish had to be counted, and it was never done. But these fish were thrown overboard in such a way that we could keep track of it.

The scows came in and there were so many fish on each scow and those fish were thrown overboard; they never entered the cannery. That is the reason we could keep track of them. [123]

Q. In the last year, whenever you dumped fish *you never you never anything* else than a scow-load?

(Testimony of H. Jonsson.)

A. It was all thrown from the scows.

Q. It was not dumped from the fish-dock?

A. I think it was dumped from the fish-dock, too.

Witness continuing: There could not be any record of it, because they could not tell how many there were. Under those circumstances they would have to be counted and tallied. The 31,698 were all thrown from the lighters. I said there were more fish than from the fish-bins. We received the fish, but we did not keep track of how many we threw overboard. We have no record of what we threw overboard except the 31,698. We threw overboard more than that. We have no record of it. Some of it went from the fish-bins or fish-dock. These fish were not charged to the Chinamen.

In 1911 we packed about 39,000 and a few hundred, for the whole season at Nushagak. We had a poor season; the poorest season we had in Alaska—well, not exactly the poorest, but it was very poor.

Our contract price to the fishermen who worked for the cannery in the season of 1910 was 3 cents; that is, 11½ cents per man per boat. Under the contract between the fishermen and the cannery, the cannery was not required to take any given number of fish every day that the cannery ran during that season. The cannery must receive from the fishermen 1,200 fish per boat during the season; that is the way I read the contract.

On the 11th or 12th of July I have testified that the fish delivered from the cannery from all sources was 8,027 salmon. No other salmon from any possible

(Testimony of H. Jonsson.)

source that day to that cannery. On the following day 24,098 salmon were delivered; the next day 23,523; and on the next 17,048. These four deliveries on those four days were [124] all the fish that were put upon the dock of that cannery in those four days. On the evening of the 10th we had left over 86,804 fish. That was an accumulation of two days.

The COURT.—Q. It could not be two days according to your figures, because you had not accumulated that many altogether in two days.

A. They received 57,000 fish some days.

Q. Oh, no, you may have had on hand and received together that much, but according to your figures this morning you did not receive any 57,000 on one day.

A. Yes, sir; we received fish on the 6th, 52,000; on the 7th, 57,000.

Q. Oh, I thought you were reading there the accumulated number of fish you had on hand.

A. No, sir.

Mr. THORNTON.—Q. You say that after the day's packing, on the 10th, was done, you had 84,000 fish still there on the dock?

A. My statement here is 86,804.

Q. Yes, 86,804. How long had that 86,804 fish been on the fish-dock or in the fish-bins?

A. I could not state exactly.

Q. How many days did that take in the accumulation? How many days did it take that to accumulate, taking away what the Chinamen had packed during those days? Take the three preceding days?

A. The three preceding days?

(Testimony of H. Jonsson.)

Q. Yes.

A. The three preceding days we received about 125,000 fish.

Q. And how many did you pack in those three days? That is, the aggregate delivery for those three days, is it, prior to the 10th? That is, the 8th, the 9th, and the 10th?

A. No, it is not on the 10th. [125]

Q. Is that the 7th, the 8th and the 9th?

A. The 7th, the 8th, and the 9th, yes, sir. On the 8th, 9th and 10th we received about 97,000.

Q. I want to get the exact number. On the 8th, 9th and 10th, the total delivery was how much?

A. 125,000.

Q. How many did you pack on those three days?

A. We packed about 7,000 cases; that would be 90,000 fish.

Q. Then you ought to have had on hand on the evening of the 10th, about 35,000 fish in your fish-bins.

A. No, because the fish we packed on those days was fish caught back of that.

The COURT.—Q. You do not keep them more than 48 hours, do you?

A. I figured the three days here; we did not pack on the 8th day any of the fish we received on the 8th; we probably received that fish on the 6th, so we still carried that amount of fish back. On the 9th we might have received the fish that was caught on the 7th. We had plenty of fish during the whole time to pack at least two day's supply. We carried more

(Testimony of H. Jonsson.)

more, but we carried at least a two day's supply right along up to the 11th.

Q. If you had 125,000 fish from all sources on the 8th, and 9th, and 10th, and on the 8th, 9th and 10th you packed 90,000, you necessarily had left the difference?

A. I did not say from all sources; we received that fish, but I did not say what we had left from the 7th.

Q. Well, give me that; I want all the elements.

A. On the 7th we had 91,979 fish left over.

Q. Were they all on the fish-dock or in the fish-bins?

A. They might have been on the scows outside the dock. We could not take in too many on the deck at one time; they are too heavy; so we kept them outside. [126]

Q. How many will your dock hold, including your fish-bins?

A. We could carry from 80,000 to 100,000 fish if we wanted to.

Q. Then, the 91,979 ought to have gone to the fish-dock, and in the fish-bins, if their capacity was 100,000?

A. Well, we would have more. Those 91,000 fish were left on that date; those were on the fish-dock.

Q. The Chinaman was, under the contract, required to pack how many per day?

A. About 33,750.

Q. On those days, prior to the 11th, you were putting in a great deal more fish in the fish-dock than he was required to pack daily? A. Yes, sir.

(Testimony of H. Jonsson.)

Q. And during that whole period of time you only threw away 31,698 fish?

A. That is the only time we kept track of them. We cannot keep track of the fish thrown off from the fish boats.

The COURT.—Q. You were not charging him for any fish you did not throw away? A. No.

Q. Now, he is asking you for the fish you threw away. A. The 31,698.

Mr. THORNTON.—Q. When were the fishermen put on the limit? A. One boat on the 8th.

Q. What do you mean, that only one boat was fishing? A. No, but one boat was put on the limit.

Q. That would be two men?

A. Yes, sir. On the 9th, six boats; on the 10th, six boats; on the 11th, six boats; and on the 12th, six boats; and on the 13th, four boats; and on the 14th, four boats.

Q. You say you had at the end of the 10th of July how many fish left? [127]

A. At the end of the 10th we had 86,804.

Q. When was the rush of fish over, when did it start to go down?

A. They started to go down and really stopped running on the 11th and then they started in again and we had a good run on other days for quite a while after.

The COURT.—Q. But nothing like the regular rush you had?

A. No, sir; nothing like the regular rush.

Mr. THORNTON.—Q. When they started to go

(Testimony of H. Jonsson.)

down, did Mr. Berglund keep the fishermen on the limit?

A. Yes, sir; and on that day, the 11th, we kept them all in because we could not handle them.

Q. And on the 12th you were still on the limit?

A. Yes, sir.

Q. And on the 13th you were still on the limit?

A. Only four boats.

Q. And on the 14th you were still on the limit?

A. There were four boats.

Q. When did the canning season commence?

A. It commenced in June.

Q. Do you know the exact date?

A. I can tell the exact date.

Q. When was the first fishing done?

A. On the 15th of June, or on the 14th of June, I cannot say just exactly. I could tell from the fish-books. I am not really sure.

Q. When did the cannery stop?

A. We canned the last day on the 31st.

Q. That is when they were running the filling machines and the stopping and soldering machines?

A. Yes, sir.

Mr. GREGORY.—Q. On the 31st of what?

A. The 31st of July. [128]

Mr. THORNTON.—It is stated in the original answer that the canning season ran from the 11th of June to the 22d day of July. That is why I asked the question. I wanted to know when it did commence and when it did end. That is all.

On redirect examination the witness testified: On

(Testimony of H. Jonsson.)

the days other than the period between the 2d and the 14th of July, both days inclusive, there were not sufficient fish to have packed 2,700 cases.

The defendant paid the fishermen \$2,206.98, concerning an item of 36,600 salmon, on account of limits, at 63 cents.

It had no reference to the number of fish which the fishermen caught or which they did not catch. It was simply an arbitrary sum that we were compelled to pay them on account of this limit.

Thereupon defendant read to the jury a portion of a bill of particulars furnished by the plaintiff in response to a demand by defendant, and on file in the action. It was as follows: [129]

“The particular items of the account mentioned in paragraph 11 of the third count of said complaint, beginning at line 4 of page 4 of said Complaint, and continuing on and through line 17 of page 4 thereof, are as follows:

By packing 66,000 cases salmon, at \$.55,	
as per contract, a copy of which is	
attached to said complaint, marked	
Exhibit “A”.....	\$36,300.00
Less amount advanced under	
contract....	\$14,000.00
Less excess of do-overs under	
contract, 1360 cases at	
\$1.80 per case.....	2,448.00
Less the following items paid	
by defendant for plain-	
tiff:	

(Testimony of H. Jonsson.)

Bill, Roth-Blum Packing

Co..... 175.50

Bill, Somers & Co..... 24.05

“ A. H. Mittendorf.. 268.85

Cash P. A. Berglund... 120.00

Cash paid out to Natives. 416.70

Merchandise bought in

Alaska.. 56.70

2 men, 11 days each at

\$4.00..... 88.00

1 man, 17 days at \$2.50.. 42.50

1 man, 17 days at \$3.00.. 51.00

Chas. Berglund, 10 days,

at \$2.00..... 20.00

Funeral expenses, 2 Chi-

nese... 20.00 \$17,731.30

\$18,568.70”

Witness continuing: The statement of 2 men for 11 days each at \$4.00 is not a correct statement. It is 17 days; and we actually paid out on that account \$156 instead of \$88. [130]

[Testimony of Carl E. Johansen, for Defendant.]

CARL E. JOHANSEN, called as a witness for defendant, being first duly sworn, testified:

I am 29 years of age and reside at Astoria, Oregon. I am a house-painter. In 1910 I was a salmon cook for defendant company. I have been a salmon cook's helper two years and a salmon cook three years, at the cannery of the defendant at Nushagak Bay. I was there during the present season of 1911, and also during the season of 1910 as salmon cook.

(Testimony of Carl E. Johansen.)

I recall that there were a number of cans which were left at the cannery when the ship sailed away. I saw them. Most of the cans that were left up there had commenced to spoil and swell; but there were some good cans among that pile, what were picked out by the Chinamen as leaky cans. I estimated the number of cans that were left there to run something over 2,000 cases. I cannot exactly remember. I think it was 2,100 and something, close to 2,200 cases was my estimate.

I had a conversation with the Chinese foreman concerning those cases. It was at the retorts where I was working. I asked him if he was not going to fix those cans that were up there. That was the day before we were going to leave. He said, "No. I think better for the Chinaman to pay for them when we get home—that is better." He did not fix them. They spoiled because they were not fixed in the right time; they were put away and they were too slow in doing their work, so they had to stay too long and they got spoiled, and they could not fix them at that time.

I had a talk with this Chinese foreman concerning his injuries. He said, "I got hurt in San Francisco; a street-car hurt me." When I saw him first, I saw him sitting on a box in the cannery. It must have been about the middle of the season. He could not walk; he had crutches. When he was moving generally a Chinaman helped him from one place to another. He was not able to get in and about the cannery [131] and to boss the men.

(Testimony of Carl E. Johansen.)

I should judge that this crew could put up somewhere around 1,800 cases a day. They could not put up 2,700 cases because they were too slow. They did not want to work; they did not know how to do the work.

I had a talk with the foreman about the men not doing their work. He told me there were some good men and some no good. I had several conversations with him about that during the canning season at the cannery. From my general experience in canneries, and with Chinese canners, I would say that this crew was incapable and incompetent to handle 2,700 cases a day.

A do-over is a leak that was not picked out in the first place and passed through the second cooking, and was piled up out in the warehouse and then came back again to be fixed over. There were a lot of do-overs outside of the 2,000 cases that were left there at the cannery, but I could not tell how many. They were taken down on the ship.

On cross-examination the witness testified:

I could not state the percentage of good cans in that pile. They were not all in one pile. There were about 1,200 in one pile in the warehouse, and there were different piles in the warehouse, and some in cannery and some in another warehouse in one pile, and about 500 cases in the same warehouse in another pile, and the balance were in the cannery and in the other warehouse.

I could not state what percentage of the cans were

(Testimony of Carl E. Johansen.)

good. On the day we left I went over the pile, and I happened to see some good cans among those leaks, so I picked out a few. I took out half a case and took it home with me. I know they were good because they are good yet. I have some left. I am not a tester. I did not give credit to the Chinese for that half case I took away. The Chinese had left them there for spoiled and leaky cans. They were not cased up. I spoke of them as cases, as I estimated them. I said at 1,200 cases in one [132] and 500 cases in another. I came as close to the estimate as I possibly could. I could not state how many minutes it took me to get that half case out of the pile. I was not busy at the time. I should judge I was there about a quarter of an hour. I did not exactly look for the cans. I was looking over the pile and taking an estimate.

I was there for four years prior to 1910. I have never worked in any other cannery. I think I consider myself competent to pass upon the skilfulness of a Chinese crew.

I do not know the process of making these cans—of packing these cans from start to finish, but I understand what this is where I was working, in the bath-room. I cooked the salmon. I do not understand the rest of the process.

Witness continuing: I do not consider there were any first-class men there but there were some good men among them. The biggest part of them I do not consider skilful men or good men at all. According to my judgment all those that are working in the

(Testimony of Carl E. Johansen.)

bath-room need to be skilful men. I do not know anything about the other parts of the cannery. I did not say the bath-room crew were good.

According to my tally they did not put up 2,700 cases one day. I have not the tally-book with me. I took an average of the coolers, large and small coolers, and I could not state how many cases are packed, but according to my tally there is no day when they put up 2,700 cases. It was over 2,600 one day. I have not got my book here, unless the company has it. According to my tally they did not pack 2,700 cases on any day. I cannot state that my tally is right, because the actual amount always ran a little over my count, and I could not state exactly. Some coolers are larger and some smaller, and when I took an average I always took 3 or 4 cans less in a cooler because sometimes the coolers are short a couple of cans; the [133] Chinamen do not always fill them up.

I don't know what date we put up the most. I think my book shows 2,676, or somewhere around there. I didn't state that it was 2,650 cases, but over that. The actual pack always overruns my count a little, generally between 200 and 500 cases every year I have been up there. One day's run it would be a few cases. I could not tell exactly how many. It would take some time to figure it out, to get the percentage of the whole pack and figure out how much it would be. It would take me some time to figure that out.

Upon redirect examination the witness testified:

(Testimony of Carl E. Johansen.)

The cans which were left at the cannery, and which were spoiled, were not in a condition to be put on the vessel; they were not labeled, and were not put up in cases.

Upon recross-examination the witness testified:

Q. Would there have been any difficulty in putting those cans in cases and putting them on the ship and bringing them down with you?

A. Well, it would not have smelled very good on the ship to have those cases along.

Q. Could you not have selected the good cans and put them in cases?

A. After the Chinamen had done so, yes, they could have done it.

Q. At whose direction were they left there?

A. The Chinaman's.

Witness continuing: I don't think each member of the crew was allowed to go and pick out a case for himself there. I asked the cannery foreman if I could have a few cans of it.

I didn't hear Mr. Berglund tell the crew to cease work and prepare to get on the ship and go home.
[134]

[Testimony of W. F. McGregor, for Defendant.]

W. F. MCGREGOR, called as a witness for the defendant, being first duly sworn, testified as follows:

I am Collector of Port at Astoria, Oregon—a Government official—and I am interested largely in salmon canning and lumbering and logging and other lines. I am the president of the defendant company. I have worked in the salmon business since 1882. In

(Testimony of W. F. McGregor.)

the year 1910 Alaska red salmon had a standard market price in the markets of the world.

Q. What was that value at the port of Astoria, or in San Francisco?

(To which question plaintiff objected, upon the ground that the market value under the answer was entirely irrelevant and immaterial.)

(Said objection was, after argument, sustained, and an exception noted for the defendant.)

(Defendant's Exception No. 8.)

Defendant thereupon made the following offer:

We offer to show that the market value of salmon at this time and place, at the nearest market to the cannery, was \$5.40 per case. We offer to show that the cost of procuring the fish, of canning the salmon and marketing them, including brokerage, cartage and transportation was \$3.90, and that the difference so-called between that and \$5.40 would be our actual loss on each case of salmon which the plaintiff failed to can in accordance with the contract. We offer further to prove that the market value of the cans of salmon which were left at the cannery, some 2,045 cases in all, was a certain sum, namely, \$5.40 if they had been properly canned, at the nearest available market, and that the cost of mending those cans and transportation to market and marketing the same, including brokerage and transportation, would have been \$3.22.

The Court declined to allow the defendant to make such [135] showing and an exception was noted by the defendant.

(Defendant's Exception No. 9.)

(COUNSEL FOR DEFENDANT.)

Q. Mr. McGregor, have you had any complaints from customers who have bought these cans for the season of 1910, since the season was over?

(To which counsel for plaintiff objected on the ground that it was immaterial, irrelevant and incompetent and not tending to support any issue in this case; that it was not set up in the answer or counterclaim that there was any reclamation on any damage.)

(The objection was sustained and exception noted.)

(Defendant's Exception No. 10.)

**[Testimony of P. A. Berglund, for Defendant
(Recalled).]**

Thereupon the witness P. A. BERGLUND was recalled for defendant and stated that he wished to correct his testimony, in that the testimony stated that the bath-room account exceeded the final account, and now testified that it was his intention to state that the final account generally always exceeded the bath-room account, and that the bath-room account was less than the total number of cases that had come down on the ship.

The defendant thereupon rested. [136]

**[Testimony of Soo Hoo Yen, for Plaintiff (in
Rebuttal).]**

The plaintiff in rebuttal, thereupon produced the following testimony:

SOO HOO YEN, called for the plaintiff in rebuttal, being duly sworn, testified as follows:

(Testimony of Soo Hoo Yen.)

I speak English. I am the Secretary of the Sam Kee Company. We took a contract from the Seattle and Northwestern Company at Nushagak.

I know the ship "St. Francis," and saw her in 1910. In the last year we had two laborers and we sent them over to Nushagak. We always send men by the steamer, but two of the laborers were lost on that steamer, and I talked to the other foreman. I said, "Your men go up there to Nushagak and I can send up two men on your vessel, to go up there for us." We sent two men up on the "St. Francis" at the same time that these other two men went up—two laborers for our cannery. We accommodate each other about this. I don't know whether they were part of the men furnished by Chin Quong. I only told him I would send up two of my men to go to Nushagak, and send them on Chin Quong's vessel. That is all I know.

On cross-examination the witness testified.

I don't know whether these men were counted as part of the 140 men or not, and I don't know that they worked a little while at the Nushagak cannery. I was in Portland at the time they came back. So I don't know how they came back. These two men that I sent up on that vessel with Chin Quong worked for our cannery; they were our men.

[Testimony of Yee Chat, for Plaintiff (in Rebuttal).]

YEE CHAT, called for the plaintiff in rebuttal, being duly sworn, testified:

I was in the cook-room in the year 1910 at Chin

(Testimony of Yee Chat.)

Quong's cannery at Nushagak. The superintendent was Mr. Berglund.

The cans were mallet-tested after they came out of the first cook. The entire pack was mallet-tested.

[137]

Q. When the Chinese and white crew left the cannery at the end of the season 1910, did they leave any cans there in the cannery or in the warehouse?

A. Several hundred.

Q. How many hundred? A. 400 or 500.

Q. Any more?

A. No. The whole pile was about that much.

Witness continuing: I was finishing the bath-room work when the superintendent announced that we were to return home, myself and the Chinese crew.

There were 400 or 500 cases, not 400 or 500 cans. The cases we left were in the corner there, or in a pile; they not in the cases yet, but there were about 400 or 500 cases left there. I am giving a kind of guess at the thing. They were left there because they were damaged seams.

The INTERPRETER.—I think that is what he means. I will ask him a little further about that and see what I can make of it. Yes, that is it. That is where they do the soldering.

The COURT.—Q. Were they spoiled?

A. No. They were not cooked.

Q. Why did they go away and leave them there then?

A. They had picked these out; they were picking these out, the ones with the broken seams, when we

(Testimony of Yee Chat.)

were called to leave the cannery and go to the city.

Q. Did they not have time to finish them?

A. If they had stopped one or two days they could have been finished.

Upon cross-examination the witness testified:

I do not know the date of the month we stopped canning fish at [138] the cannery, nor the day of the month when the ship sailed for San Francisco.

Twelve men were working on this pile of damaged fish at the time they called us to go away. Some were mending cans in this particular pile. We were working on this pile of cans. Every day they picked some out and we worked on them. They were putting them in the cans until they came away, until the ship got away.

Q. You say, do you, that you could have mended all those cans that were left there, in two days?

A. It depends on how much fire; if they gave us plenty of fire we could do it, but when they gave us just like a candle fire then we could not do it.

Q. Did you count the number of cans in this pile?

A. I have had about 20 years' experience in canning and I—

Mr. GREGORY.—I ask that that part of the answer go out as not responsive.

The COURT.—Let him finish his answer.

A. (Continuing.) About 20 years' experience and, therefore I know about how many were there.

Witness continuing: I did not count the number of cans individually, but I estimated the cans.

Q. Were there more than one pile of these dam-

(Testimony of Yee Chat.)

aged cans? A. One pile.

Q. All in one pile, were they?

A. Yes, when we left for San Francisco. [139]

**[Testimony of Herbert G. Gray, for Plaintiff (in
Rebuttal).]**

HERBERT G. GRAY, called for the plaintiff, in rebuttal, being duly sworn, testified:

I am a machinist, 30 years old, and reside at Burlingame, San Mateo County. I was machinist in the Nushagak Cannery in the year 1910. I worked there the entire season. I remember when the ship left to return home at the end of the season. It was the latter part of August.

The company left some cans there of fish in the cannery, or in the warehouse. I suppose I saw all of the cans that were left there, but I could not say I did see them all. I did not take a special look through the cannery and the warehouse at the time I left. I just walked through.

Q. How many cases of fish in cans were left there?

A. I did not see any cases.

Q. Well, in piles, how many cases?

A. I could not give any estimate.

Witness continuing: The pile was probably 6 feet wide and probably 15 feet long. I could not say how many cans, but probably between 3 and 4 feet high. It was piled in one of the canneries.

Q. Was there any pile in the warehouse, or any other place? A. That was in the warehouse.

Witness continuing: I saw a small pile a little above and opposite the one I have just mentioned. I

(Testimony of Herbert G. Gray.)

would not give any size as to that. I could not estimate how many cases were in it. I have so little handling of cans that I could not say. I would not venture a judgment upon that question. This pile was less than half the size of the other pile.

Upon cross-examination the witness testified:

I would not say that there were any more than two piles in [140] the entire place, either in the warehouse or cannery. My attention was not particularly called to this question. I just happened to walk through the cannery and noticed these cans. I understand there was a place where they put the cans that had to be done over or mended. The cans were in different piles because they were different kinds of fish. They were in the same room but they were in different piles. I understand that whatever leaks there were had to be mended. I did not notice any smell. I don't know just how long it would take for the salmon to spoil. I would not judge exactly as to the size of the piles—about 6 by 16 feet. I was very little concerned with the canning of salmon. I was not particularly asked to go and make any account of what was left there; I simply happened to see the cans there.

[Testimony of Walter Story, for Plaintiff (in Rebuttal).]

WALTER STORY, called for plaintiff in rebuttal, being duly sworn, testified:

I am 65 years old and have had 40 years' experience in the cannery business.

In the canning of salmon, after the first cook, and

(Testimony of Walter Story.)

the cans are taken out of the first cook, and in the bath-room, they are mallet-tested for the purpose of detecting any leaks. If there is a leak when they come out of the bath the top and the bottom are expanded, and if there is a leak and you touch it with a mallet it collapses immediately. There are five to seven tests made throughout the entire process of going through the cannery. The mallet-test I consider the most important.

On cross-examination the witness testified:

There is only one routine to go through. After the first cook you test with the mallet, and then the cold test, and so on, up to placing them in the case.
[141]

(COUNSEL FOR PLAINTIFF.)

Q. In making a pack of 44,000 cases, how much debris will necessarily accumulate, under a pressure of say where the bulk of the pack must be made in 15 or 20 days?

COUNSEL FOR DEFENDANT.—Do you mean debris of fish or of cans?

COUNSEL FOR PLAINTIFF.—I mean cans and fish and material of all kinds.

The COURT.—Do you mean by way of defective cans?

COUNSEL FOR PLAINTIFF.—By way of defective cans filled with fish.

The COURT.—You mean about the percentage?

COUNSEL FOR PLAINTIFF.—Yes, the percentage of waste, inevitable waste.

A. That would depend somewhat. Of course,

(Testimony of Walter Story.)

there might be quite a difference in one cannery from another cannery, but from 300 to 500 cases would not be amiss—bruised and mashed, and jammed, and in different ways.

Witness continuing: I say that from 300 to 500 cases would inevitably and necessarily accumulate during the season in some canneries, perhaps more in others. The question that controls the number of these damaged cans is more the rush of the cannery than efficiency of the men. If you were receiving 40,000 or 50,000 or 100,000 fish a day, or 200,000 or 300,000 fish, and you were forcing your pack, you would undoubtedly encounter more damaged cans.

The machinery has a whole lot to do with it in determining the percentage of damaged cans, and the men surely have. In my answer of 300 to 500 cases I assume good machinery and a good crew.

(Witness is shown Defendant's Exhibit "D.")

Witness continuing: There was a leak in the seam, because it has been repaired; it is a mended seam. This has not been done by an expert, by a mechanic. [142] It has been done by some repair-men; somebody has been practicing, I should judge, learning to handle the solder-iron. No mechanic would have done that. I should say that it got in there by an inexperienced man. There has been a large hole there perhaps caused by the rough handling and jamming of crates and so forth in the rush. That would have been a can usually thrown away as one of your cans that occurs in a cannery every day or every minute during a rush. Such cans are usually thrown

(Testimony of Walter Story.)

away; it would not be marketable at all. It would not be merchantable. Unquestionably that solder got in there by somebody inexperienced in using solder trying to mend the hole; and being unskilful he let that much solder get through the hole in his effort to fix it up.

I have not had anything to do with fishing in Bristol Bay. I have never been in Bristol Bay.

This work on the can could not have been done by an experienced stopper.

**[Testimony of P. A. Berglund, for Plaintiff,
(Recalled in Rebuttal).]**

P. A. BERGLUND, recalled for the plaintiff, in rebuttal, testified:

I do not remember exactly the catch made on the 6th day of July, 1910—that is, the fishermen's catch. It might have been over 50,000 salmon. I cannot say. The books will show the exact number. I would not care to say the number of fish that were caught every day. I know we had enough fish every day. It would take us between 36 and 48 hours to get that catch of fish to the cannery and be delivered on the fish wharf.

Upon cross-examination the witness testified:

Some of the fishermen were working near the cannery and others were working far off. It would not take 48 hours for the fishermen who were nearest to the cannery to get their fish in, but we did not have room enough on the dock to bring them in. It would not take over half [143] an hour from the nearest point to the cannery to get the fish into the cannery.

(Testimony of P. A. Berglund.)

The reason we allowed the 48 hours was because we had no place to put them when they did get there.

In reply to questions upon redirect examination the witness testified:

These fish were delivered with the tide. It was necessary that the tide be just right in order that the scows could get up to our wharf, but the fishermen could deliver from the lighters on the scows out in deep water at any time, and then it took the tide to bring the scows up. The delivery of fish to the fish-dock is dependent on high water. We had two tides a day.

[Testimony of H. J. Barling, for Plaintiff (in Rebuttal).]

H. J. BARLING, called for plaintiff in rebuttal, being duly sworn, testified:

My experience as a cannery-man has been from the year 1884 until 1900. I have packed salmon in Karluk, on the Kodiak Islands, and also in Ngashik, Bristol Bay. Ngashik is about 110 miles from the cannery of this defendant.

(The witness is shown Defendant's Exhibit "D.")

Q. Is there a seam leak there?

A. Well, not now; it was a seam leak. It shows evidence of having been mended by the soldering-iron. The overflow on the cap demonstrates that—the overflow of solder when the man pulled the solder back. That was an unprocessed can; I do not see any vent in it.

Witness continuing: It had never been cooked.

(Testimony of H. J. Barling.)

The solder evidently got through this hole when the can was either jammed or mashed.

The tests made in the progress of the cans through a salmon cannery are: The first test is the hot-water test, of the test-kettle; the next succeeding test would be the mallet test; after the first [144] cook, prior to their being retorted in the second cook. The third test would be the cold test; after the retorted salmon had been laid out on the platforms to cool.

The mallet-test is the most important of these tests. I used it for two seasons in the Bristol Bay region. No other test could be made in that particular point of the process, because the cans are warm and the tops and bottoms are bulged outward. That is the point in the canning after the vent where it is hermetically sealed. Then it is hermetically sealed subsequent to the stopping. It is a very severe test on the seams of the can. It could never happen that a hermetically sealed can, which is perfect in the way it is put up, is going to be injured by being put in a pile that is liable to spoil by reason of having leaked. The can that would be perfectly put up and hermetically sealed would be impervious to the approach of any injury from its neighbor.

On cross-examination the witness testified:

I have not been in Bristol Bay since 1895. My present business is building contractor. I have taken a very deep interest in this case. For the last four or five months I have been attending to it. I am not an attorney at law. I went up to Astoria when they took the depositions of some of the defend-

(Testimony of H. J. Barling.)

ant's witnesses. I have also been present in court when any law matter was argued. I have no arrangement for compensation from this plaintiff considering the amount of the verdict. I am doing all this work gratuitously, out of friendship for the Chinese, and have done so before for other Chinese, and have never been paid. I am a friend of particular men, not a benefactor of the race.

I have not been in the cannery business since the season of 1900. I do not think that the Chinese working on Bristol Bay have within the last few years declined to use the mallet-test. I have [145] not been there myself but I know of contracts entered into between certain companies and certain Chinese where the mallet-test is expressly provided for in the contract, at Bristol Bay canneries. I do not know whether the Chinese have as a rule declined to make the mallet-test where the mallet-test is not provided for in the contract.

Thereupon the plaintiff rested.

The defendant in surrebuttal introduced the following testimony:

**[Testimony of P. A. Berglund, for Defendant
(Recalled in Surrebuttal).]**

P. A. BERGLUND, recalled for defendant in surrebuttal testified:

We have never got the Chinese crew to use the mallet-test. It used to be customary years ago, but not for the last 10 or 12 years. They would not even pick out leaks that were already collapsed. We wanted them to pick them out but they let them go

(Testimony of P. A. Berglund.)

through quite often, so we could never enforce the mallet-test. It would have taken them twice as long to do the work. The mallet-test is not used. No test takes its place. There are other tests than the mallet-test which are used later on, and I have already testified to these. The mallet-test is done in the bath-room, and the other tests come after that.

There were three piles of damaged cans left up there.

Q. Where were these piles?

(The Court thereupon stated that he would not permit such question, upon the ground that it was not rebuttal.)

Counsel for defendant thereupon stated: When we put in our case we said there were a certain number of cans, 2,045 cases in all, which were left there. When they come forward [146] in their case they produce a witness who states he does not know how many cans there were but that he saw one pile, giving it as 6 feet wide and 15 feet long, and then he saw another pile about half that size. I now desire, for the first time, to ask this witness how many piles there were.

(The Court thereupon stated that he would not allow defendant so to do, as it was not rebuttal testimony.)

(And an exception to the Court's rulings upon the question of the right of defendant to examine the witness concerning the location and number of these piles was allowed the defendant.)

(Defendant's Exception No. 12.)

[Testimony of H. J. Barling, for Plaintiff (Recalled in Rebuttal).]

The witness H. J. BARLING was thereupon recalled by the plaintiff and testified:

I am familiar with the counting and estimating the number of cans in a pile. There would be about 275 cases in a pile 6 feet by 15 feet long and 4 feet high; and in three piles of the same size there would be about 850 cases.

In the opening statement of counsel for plaintiff he said, among other things, the following:

The second cause of action is based upon the payment by the plaintiff, for and on behalf of the defendant, of \$1,671.40, for nailing up 26,000 box shook, at a cent a case, and for the wages agreed to be paid by the defendant for one cook, three testers and one Chinese foreman, the first four men at \$50 a month, from the commencement of the voyage from San Francisco until their return at the port of San Francisco, making, I believe, five months and four days. That is the second cause of action.

That Chin Quong, the plaintiff in this case, paid for the cook, three testers and for the wages of the foreman for five months [147] and four days, which is chargeable to the defendant; that his men also nailed up 26,000 box shook, at one cent per case. We will show you that that is the reasonable cost thereof. That is outside the contract. That is work not done under the contract. It is an extra item chargeable against the defendant. And I

understand, Mr. Gregory you do not make any point about that, do you?

And thereupon the following proceedings took place:—

Mr. GREGORY.—No, that is admitted in the pleadings. You may eliminate the cook, the three testers, the foreman and the shooks. I think though there is one dollar difference between us as to those accounts, but that does not make much difference.

Mr. THORNTON.—No, we will take off the dollar.

The COURT.—That is, that the plaintiff nailed up 26,000 box shook, at a cent a case, which is \$260, and also paid a Chinese cook, three testers and the Chinese foreman; the defendant admits those items, and that plaintiff should be reimbursed.

Mr. THORNTON.—Yes, your Honor.

Both parties thereupon rested and the evidence was declared closed.

The case was thereupon argued to the jury by counsel for the respective parties, and thereupon the Court charged the jury as follows:

Gentlemen of the Jury, it remains for me to submit to you the principles of law that will govern you in your consideration of this case for the purpose of arriving at a verdict. I ask your careful attention while I do so.

This is an action by the plaintiff Chin Quong to recover from the defendant the Alaska Fishermen's Packing Company the sum of \$20,240.10, made up of two separate items or amounts alleged in the complaint to be due plaintiff from defendant. [148]

The first count of the complaint is for an item or sum of \$18,568.70, which is alleged to be due plaintiff as a balance remaining unpaid by defendant under the terms of the written contract sued on, for the packing of salmon for the season of 1910 at the Nushagak Cannery of the defendant. The contract has been read to you and you are familiar with its terms. Under that contract the full consideration to be paid plaintiff for fulfilling and carrying out its terms on his part, is the sum of \$36,300. It is alleged in the complaint that plaintiff has fully performed that contract in all respects; that defendant has advanced and paid to the plaintiff under its terms the sum of \$14,000 in money; and has, in addition to that payment, laid out and expended for plaintiff's benefit and at his request the further sum of \$1,283.30; that in addition to this last sum defendant is also entitled under the terms of the contract to a further credit of \$2,448.00 on account of an excess of do-overs as provided in the contract; that deducting the payment of \$14,000 and the two other items of credit above mentioned from the entire amount of \$36,300 to be paid plaintiff for performing his contract, there is left a balance in the said sum of \$18,568.70 due to plaintiff upon said contract which the defendant has not paid.

In addition to this sum, the plaintiff alleges in a second count that there is due him from the defendant the further item of \$1,671.40 on account of work and labor performed by plaintiff for defendant outside the terms of the contract, in assembling and nailing up 26,000 box-shook—that is, as I understand it

from the evidence, in making up that amount of prepared material into packing cases or boxes. As to this item the defendant admits that plaintiff did this work and is entitled to credit for that sum in his account. This item added to the sum of \$18,568.70, claimed to be due under the contract, makes up the full amount above-mentioned for which plaintiff sues, of \$20,240.10; and if you should conclude and find under the [149] principles I shall state to you that plaintiff has in all respects as alleged performed his part of the contract sued on, and that the items for which he has given defendant credit in his complaint are correct, then your verdict would be for plaintiff in that sum of \$20,240.10.

There is a third count in the complaint under which plaintiff alleges that there is due him from the defendant the same amount claimed in the first count, that is \$18,568.70, for and on account of work, labor and service performed by him in packing the season's fish as that involved under the contract sued on. This latter count proceeds upon the theory that if the evidence should develop that plaintiff has failed in any material respect to fulfill the contract sued on in the first count, he would nevertheless be entitled to recover for the reasonable value of the services actually rendered defendant in his efforts to carry out that contract, and it is claimed that such services were reasonably worth the sum of \$18,568.70, over and above the credits given the defendant. This theory is correct in its application to this case, to this extent:

Should the evidence fail to satisfy you that plain-

tiff has fulfilled the terms of his contract in all respects, he would still be entitled to recover the reasonable value of his services, but in that event such services would be measured by the number of cases of fish actually packed. That is to say:

Under the contract, if performed by plaintiff, he was to be paid upon the basis of a pack of 66,000 cases, whether that number were packed or not; that being a guarantee given by defendant for plaintiff's benefit; and that is the basis upon which the balance alleged to be due plaintiff under the first count is estimated. But if the plaintiff has failed to fulfill the terms of the contract, then he can recover only for the number of cases actually packed, which is admitted to be 44,619, which, at the rate of 55 cents per case, would [150] make the value of plaintiff's services under this count the sum of \$24,540.45, instead of \$36,300, as stipulated in the contract. Therefore, should you find that plaintiff has failed to fulfill his contract and is only entitled to recover the value of his services, your verdict would be for the sum made by adding \$24,540.45 and the item of \$1,671.40 admitted to be due plaintiff under the second count, which is \$26,211.85, less the credits you may find the defendant is entitled to have deducted from that sum.

The defendant, while admitting the execution of the contract sued on and its partial performance by plaintiff, denies that there is anything due the plaintiff thereunder by reason of the fact, as defendant sets up, that it has suffered damage through plaintiff's failure to perform the contract, in an amount

in excess of that sued for by plaintiff; and in that connection defendant has, by a pleading known as a counterclaim, sought to offset the amount claimed by plaintiff and to secure affirmative relief against him on account of alleged breaches of contract by the plaintiff. In a general way it may be stated that the defendant alleges as one of its causes of counterclaim that plaintiff did not put up the number of fish required under the contract. The contract provided that the plaintiff should put up not less than 2,700 cases of fish per working day, provided he was furnished by defendant with sufficient fish for that purpose. This was a stipulation by which the plaintiff was bound, and if you find that the defendant at any time or times during the season furnished and delivered to plaintiff at the cannery a sufficient number of fish for the purpose, and the plaintiff, through no fault of the defendant, failed to pack the requisite number of cases to come up to the stipulated limit, this would constitute a failure to fulfill his contract, and the defendant would be entitled to recoup from the plaintiff for such failure at the rate of one dollar per case as stipulated in the contract for the number of cases plaintiff [151] so failed to pack.

It is further claimed by defendant in its counterclaim that by reason of the inefficiency and careless work of the plaintiff's men 2,045 cases of salmon were totally spoiled and left at the cannery and could not be marketed. The contract required that the work should be done in a skilful and workmanlike manner by the plaintiff's men, and with care and diligence, and to the satisfaction of its superintendent. Should

you find that this or any number of cases of salmon were so spoiled and rendered valueless solely by reason of the neglect, unskilfulness or want of diligence of plaintiff's men, and without the fault of defendant, then defendant would be entitled under its counterclaim to the damages suffered thereby, and to be compensated for such loss in accordance with the terms of the contract. In that respect the contract provides:

“All swelled cans, in excess of four (4) cans per hundred (100), all light cans, all cans collapsed, burst or deficient in seams (where any of said faults or defects are the result of want of skill of the party of the first part), to be paid for by the said party of the first part at the rate of six (6) cents per can.”

“All leaks to be mended by skilled labor daily by party of the first part, and said mended cans to be accepted or rejected according to the condition of the fish, and if not so mended daily the party of the first part agrees to pay the party of the second part the sum of \$3.00 per case.”

Under these provisions defendant would be entitled to a credit and recoupment against any amount found due the plaintiff, at the rate of six cents per can for all salmon so spoiled coming within the first of those provisions; and at the rate of \$3.00 per case for *for* all coming within the second of those provisions.

There is evidence in the case to the effect that there were good cans among this 2,045 cases claimed by defendant to have been left at the cannery. If you be-

lieve from the evidence that the crew of plaintiff were engaged with due diligence and proper effort in [152] separating the good cans from the bad and that the defendant, by and through its superintendent, ordered them to cease working upon the same and embark upon defendant's vessels to return home, and without any fault on the part of plaintiff's crew good salmon were left in the cannery by the defendant, then I charge you that the defendant is entitled to no allowance for the good salmon so left.

Defendant also claims that plaintiff failed to furnish the requisite number of men called for by the contract to carry out its terms. The contract required the plaintiff to furnish and place aboard the defendant's vessel at San Francisco a sufficient crew of not less than 140 men, made up as therein specified, to do the work stipulated for in the manner required by the terms of the contract. Plaintiff was bound to fulfil this requirement by furnishing sufficient men to properly do the work. Defendant's claim in this respect is that plaintiff furnished a crew of but 138 men, instead of 140 as stipulated, and that certain of these men deserted at the cannery and failed to work. Should you find defendant's claim in this regard to be sustained by the evidence, and that by reason thereof plaintiff was unable to perform the work contracted for in the time and manner stipulated, this would constitute a failure on the part of plaintiff to carry out his contract. Should you find, however, that plaintiff has performed his contract with defendant, then the fact that he had failed to furnish the precise number of men mentioned in the contract

would be immaterial. All plaintiff was required to do was to carry out the contract by putting up the season's catch in accordance with its terms, and if he has performed that service it would not be a breach of his contract or affect his right to recover, that he had done that work with a less number of men than that mentioned in the contract.

In its answer the defendant sets up that it has laid out and expended in plaintiff's behalf and at his request the sum of \$1,331.30, [153] instead of the sum of \$1,283.30 which the plaintiff admits in its complaint. In this regard it will be your duty to find from the evidence the just amount for which defendant is entitled to credit on this account, and if you find it is more than that admitted by plaintiff the defendant will be entitled to credit for the amount you so find; but in any event it will be entitled to credit for the sum of \$1,283.30 admitted in the complaint.

In this connection you will bear in mind, as above stated, that plaintiff admits in its complaint the receipt from defendant of \$14,000 advance payment on the contract, and that amount the defendant is entitled to have credit for in your verdict.

The defendant also claims certain moneys as due it from plaintiff on account of do-overs. In this connection you will bear in mind that the plaintiff has admitted this claim to the amount of \$2,448, and therefore you must, in your verdict, consider this amount as an admitted credit to which defendant is entitled.

And finally, in this connection, if you find that the evidence supports the items of defendant's counter-

claim which I have mentioned, either in whole or in part, then you must give the defendant credit for the aggregate amount of damages so suffered by it; and if you conclude that the defendant's damages so suffered and established by the evidence exceed the whole amount which you shall conclude is due from defendant to the plaintiff for the services performed by him, then it will be your duty to render a verdict in defendant's favor for such excess, not to exceed the amount claimed by defendant, and plaintiff will be entitled to no verdict at your hands.

In this case the onus of proof rests upon the plaintiff to establish by a preponderance of the evidence to the allegations of his complaint, that is, to the extent that they have not been admitted. And that means that he must establish it by evidence which to some extent in your judgment is of greater weight or value than that [154] which is presented against it. It does not mean that you are required to find a fact in accordance with the testimony of the greater number of witnesses but you are to determine in accordance with the principles that I shall state to you where the weight of evidence lies. And if you find that it preponderates in favor of the plaintiff, then he will be entitled to recover as to any issue upon which such evidence was presented. On the other hand, the onus and the burden of proof rests upon the defendant equally to establish the items of its counterclaims. And with reference to those various items, the defendant must satisfy you by a preponderance of the evidence that his claim is correct, otherwise you cannot give him credit for the item

so claimed. If the evidence should in any instance be equally balanced as to any of those items, then it would be your duty to reject them because the burden rests, as I say, upon the defendant to establish the items of its cross-complaint by this preponderance of evidence.

The jury are the sole judges of the facts in the case and of the creditability of the witnesses. And in this connection it is your duty to decide in favor of the party on whose side the weight of evidence preponderates and in accordance with the reasonable probability of truth. If the evidence is contradictory your decision should be in favor of its preponderance. It is your duty, however, if possible, to reconcile such contradictions so as to make the evidence reveal the truth; and if this cannot be accomplished, and if the evidence on any question is so equally balanced in weight and quality that the scales of truth hang even, then your verdict should be against the party holding the affirmative proof on that issue.

In determining the credibility of a witness you should consider whether his testimony is in itself contradictory, whether it has been contradicted by other creditable witnesses, whether the statements are reasonable or unreasonable, whether they are consistent [155] with the facts established by other evidence, or admitted. You may also consider the witnesses' manner of testifying on cross-examination and otherwise, their bias or prejudice, if any, manifested by them while testifying, their interest, or absence of interest in the suit, their recollection,

whether good or bad, clear or indistinct, concerning matters about which they testify, their motives or inclinations as disclosed by their evidence, together with their knowledge of the facts of which they speak, and from all these elements you are to resolve what testimony you will accept and what testimony you will reject.

In this respect, if any witness examined before you has, in your judgment, wilfully sworn falsely as to any material matter it is your duty to distrust his entire evidence, and you may reject it all if you see fit.

The evidence in this case, gentlemen of the jury, is decidedly conflicting upon a number of different propositions. Now, as I have already suggested to you, it will be your duty to reconcile that conflict as best you may under the principles that I have stated to you. It is necessary for you to reach a conclusion notwithstanding such contradictions, and therefore you must reach a conclusion as to where the preponderance of the evidence lies in the manner which I have indicated to you.

And with reference to the testimony of witnesses, if a witness comes upon the stand and shows either a reckless desire to answer what ever his counsel asks of him, without hesitation or apparently with a desire to give testimony strongly in favor of the party who has put him on the stand, that should be a reason for distrusting the evidence of such a witness in its fullness, and you should scan it carefully to determine in your own minds how far it accords fully with the facts about which he has testified.

One of the questions in the case which has given rise to considerable [156] evidence and controversy is the question as to whether a sufficient number of fish were supplied by the defendant to the plaintiff to pack the number stipulated in the contract, to wit, 2,700 cases per day. Now, you will review that evidence carefully in your minds and determine whether it has been shown on the part of the defendant in its counterclaim that this contract has not been carried out, that it did furnish sufficient fish to enable the plaintiff to pack the number of cases required by the contract, and if it did, and through the failure of the plaintiff, and without fault on the part of the defendant, the plaintiff has failed to pack that number of fish, why then, of course, as I have heretofore instructed you, the plaintiff will have been shown to have breached this contract, to have failed to fulfil it, and the result would follow which I have already indicated.

And in that connection, as has been argued to you by counsel, fish are only delivered under this contract by the defendant to the plaintiff if they are delivered in the manner and at the place designated in the contract, and, as I have suggested, with the terms of that contract you are familiar and you will recall where it was required that these fish should be delivered.

As I have suggested, the plaintiff is required, in order to recover upon his contract, to show that he has performed the stipulations of that contract on his part. Now, he has performed that contract if he has done the work called for with the skill, dili-

gence and efficiency usually obtaining in such work. There has been evidence put before you here as to that class of work and what the usual result is in putting up a pack of fish, as to the number of cans or cases in a given number that will usually be spoiled or destroyed through one cause or another. You have a right to take that evidence into consideration and determine whether the loss of fish which has been testified to here, that is, I mean the loss in spoiled cans, was [157] any more than the usual loss that occurs in operations of that kind. If there were not, then the plaintiff has performed the contract as it is contemplated by the law he should have performed it—with due diligence; although not such as to absolutely preclude any loss of fish through faulty work, nevertheless, in such a way that has avoided a loss which is unusual or beyond that which is ordinarily experienced in such work.

And now in conclusion, gentlemen of the jury, I wish to say this to you, though I think perhaps it is hardly necessary to men of intelligence like yourselves. It has been well stated to you by one of the counsel in his argument that before the law all suitors stand on an even plane, without regard to race, to condition, to status, or anything of that kind; white, black and yellow stand on an even plane before the law. It is as much your duty to give one of any nationality the same measure of justice as you would one of another nationality. You will bear this in mind in reaching your conclusions in this case, to see that you do even and exact justice between these parties. If this Chinese has performed this contract

he is entitled to the compensation the contract stipulated he should have; if he has not performed it, then the defendant is equally entitled to have the benefit of the results which flow from it under the law by reason of such breach.

And you understand, all of you I suppose, that in the Federal Courts your verdict must be unanimous; you cannot find a verdict by a less number than the entire twelve.

I have indicated to you in my charge in a general way as to the character of your verdict. If you find in favor of the plaintiff your verdict will be for him for such amount as you find under the principles I have given you he is entitled to. If your verdict should be in favor of the contention of the defendant, that is, that it has [158] suffered a greater damage than the amount the plaintiff is entitled to recover by reason of the balance still remaining unpaid to him under this contract, or for the work that has been done, then, as I have stated to you, the defendant would be entitled to a verdict at your hands for that excess.

The Court thereupon asked if counsel had any exceptions, and the following proceedings took place:

Mr. THORNTON.—If your Honor please, I would just like to except to that portion of the charge which permits this jury to allow the plaintiff less than 55 cents per case on the whole 66,000 guaranteed in the contract, so far as your charge relates to the common count, the third cause of action stated in the complaint.

Mr. GREGORY.—If your Honor please, at this

time we would like to take an exception to that portion of the instructions which says that debris cans which have been referred to could be considered a portion of the 2,045 cases.

The COURT.—What is that?

Mr. GREGORY.—That the general loss of a cannery can be considered a part of the 2,045 cases.

The COURT.—That is for the jury to determine, whether they were a part of such loss, or not. You need not argue your exceptions, just simply state them.

Mr. GREGORY.—I am simply stating my exceptions. I am not attempting to criticize the instructions, I have no criticism to make about them. We except to the instruction that we were to deliver to the cannery at the place named; the word used in the contract is that we “furnish” the fish to the plaintiff.

The COURT.—Well, I will substitute the word “furnish.” The word “furnish” however, means “delivered.” My interpretation of [159] the contract would be that the fish must be delivered at the cannery in such a way as was stipulated and in accordance with the terms of the contract.

Mr. THORNTON.—And, if your Honor please, the contract says that the plaintiff will receive the fish at the dock.

Mr. GREGORY.—It does not say on the dock, it says the defendant shall furnish the plaintiff with the fish.

The COURT.—The word “furnish” means deliv-

ered, that is, in accordance with the terms of the contract.

Thereupon the jury retired to deliberate upon its verdict, and thereafter returned into Court and rendered a verdict in favor of the plaintiff and against the defendant, and assessed the damages in the sum of \$20,192.10. [160]

The defendant now specifies the particulars wherein the evidence is insufficient to justify the verdict, as follows:

1. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that the said plaintiff has duly performed all the covenants, stipulations and conditions on his part to be performed as imposed by a certain Agreement dated November 20, 1909, between the said plaintiff and the said defendant, a copy of which is attached to the complaint on file herein as Exhibit "A" and made a part of the said Complaint.

2. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that there is a balance due from the defendant to plaintiff under the said Agreement, Exhibit "A," in the sum of \$18,568.70, or any sum.

3. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that the Copartnership of Quong Kee Company prior to the commencement of this action assigned to the plaintiff all the right, title and interest of said copartnership in and to the said agreement, Exhibit "A," or to any money due thereon.

4. The evidence is insufficient to justify the ver-

dict in that the evidence is insufficient to justify a finding that the defendant is indebted to the plaintiff in the sum of \$18,568.70, or any sum, on account of work, labor and services done and performed by plaintiff for defendant. [161]

5. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that there is any sum of money due from the defendant to plaintiff.

6. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that the plaintiff did not fail to perform the obligations imposed upon him by the said agreement, Exhibit "A," in not furnishing the requisite number of men called for by said agreement, and that said plaintiff did not fail to furnish sufficient skilled men to perform said obligation, and that said plaintiff did not pack the number of fish required of him under the terms of said agreement to be packed, viz., 2,700 cases per day when furnished with fish by defendant for that purpose.

7. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that the defendant did not dump and destroy 31,698 salmon fish on account of the failure of plaintiff to perform the obligations imposed upon him under said Agreement, Exhibit "A."

8. The evidence is insufficient to justify a finding that the said defendant did not lose 36,600 salmon fish on account of being compelled to limit its fishermen and to limit the number of fish per day by reason of the inability of the plaintiff to perform the

obligations imposed upon him under said agreement, Exhibit "A."

9. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that [162] the defendant did not lose 2,045 cases of canned salmon on account of the carelessness, negligence, unskilfulness and incompetency of plaintiff and his employees.

10. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that the said defendant was not damaged by the failure of the plaintiff to pack 2,700 cases of salmon per day in accordance with said Agreement, Exhibit "A."

11. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that the said plaintiff did not wholly fail and neglect to pack 6,376 cases of salmon in accordance with the terms of said Agreement, Exhibit "A," and when furnished by defendant with fish for that purpose.

12. The evidence is insufficient to justify the verdict in that the evidence is insufficient to justify a finding that the said defendant has not by reason of the failure of the plaintiff to perform the obligations imposed upon him by the terms of said Agreement, Exhibit "A," been damaged in a sum equal to or greater than the sum due from defendant to plaintiff.

The defendant now specifies wherein the said verdict is against law as follows:

The verdict is against law in that the loss to the

defendant caused by the failure of the plaintiff to perform the obligations imposed upon him by the terms of said contract, Exhibit "A," was shown by the evidence to be equal to or greater than the amount due from defendant to plaintiff. [163]

Defendant now particularly specifies and sets forth the

ERRORS AT LAW

occurring at said trial as follows:

1. The Court erred in refusing to allow the defendant to file its Amended Answer and Counterclaim presented to said Court at the commencement of the trial herein.

2. The Court erred in admitting in evidence the purported assignment, Plaintiff's Exhibit 3, from the Quong Kee Company to the plaintiff, to which an exception was taken.

Exception No. 2.

3. The Court erred in admitting plaintiff's Exhibits "O" and "N" in evidence attached to the deposition of the witness E. P. Nounan and showing the sales of cases of salmon by defendant for the year 1910, to which exceptions were taken.

Exception No. 5.

4. The Court erred in overruling the motion of defendant to strike out the answer given by the witness Kep Yung as a part of plaintiff's case in chief concerning the machinery and the efficiency of the machinery of the defendant company, upon the ground that it was not within the issues framed by the complaint; to which ruling exceptions were taken, notwithstanding the fact that at a subsequent stage

of the trial the said evidence was eliminated by the Court.

Exception No. 6. [164]

5. The Court erred in denying the motion for a nonsuit made by the defendant to the first cause of action set forth in the Complaint, to which an exception was taken.

Exception No. 7.

6. The Court erred in sustaining the objection of the plaintiff to the second of the following questions asked by defendant of the witness W. F. McGregor:

Q. During the year 1910 did Alaska red salmon have a standard market price in the markets of the world? A. Yes.

Q. What was the value at the Port of Astoria or San Francisco?

To which last question the objection was made that the market value under the answer is entirely irrelevant and immaterial.

Said objection was sustained and exception noted by the defendant.

Exception No. 8.

7. The Court erred in refusing to allow the defendant to make any showing as to the market value of canned salmon during the year 1910, to which ruling exception was taken.

Exception No. 9.

8. The Court erred in refusing the defendant the right to show the actual loss which the defendant suffered by reason of the failure of the plaintiff to can a case of salmon in accordance with its contract,

and also refusing its offer to show the actual loss to the defendant resulting from the loss of 2,045 cases left at the cannery. [165]

9. The Court erred in sustaining the objection of the plaintiff to the following question asked the witness W. F. McGregor:

Q. Have you had any complaints from customers who have bought those cans for the season of 1910, since the season was over?

To which ruling an exception was noted.

Exception No. 10.

10. The Court erred in refusing to allow the witness P. A. Berglund to answer the question:

Q. Where were these piles? (Referring to piles of canned salmon.)

And also in refusing to allow the witness to state how many piles of canned salmon there were in the lot 2,045 cases; to which an exception was noted.

Exception No. 12.

11. The Court erred in instructing the jury as follows:

“One of the questions in the case which has given rise to considerable evidence and controversy is the question as to whether a sufficient number of fish were supplied by the defendant to the plaintiff to pack the number stipulated in the contract, to wit, 2,700 cases per day. Now, you will review that evidence carefully in your minds and determine whether it has been shown on the part of the defendant in its counterclaim that this contract has not been carried out, that it did furnish sufficient fish to enable the plaintiff to

pack the number of cases required by the contract, and if it did, and through the failure of the plaintiff, and without fault on the part of the defendant, the plaintiff has failed to pack that number of fish, why then, of course, as I have heretofore instructed you, the plaintiff will have been shown to have breached this contract, to have failed to fulfill it, and the result would follow which I have already indicated.

And in that connection, as has been argued to you by counsel, fish are only delivered under this contract by the defendant to the plaintiff if they are delivered in the manner and at the place designated in the contract, and, as I have suggested, with the terms of that contract you are familiar and you will recall where it was required that these fish should be delivered."

To which an exception was noted. [166]

12. The Court erred in not including in the foregoing instructions a statement to the effect that the defendant was only required to furnish fish to plaintiff as required by the plaintiff.

13. The Court erred in instructing the jury as follows:

"As I have suggested, the plaintiff is required, in order to recover upon his contract, to show that he has performed the stipulations of that contract on his part. Now, he has performed that contract if he has done the work called for with the skill, diligence and efficiency usually obtaining in such work. There has been evidence put before you here as to that class of work

and what the usual result is in putting up a large pack of fish, as to the number of cans or cases in a given number that will usually be spoiled or destroyed through one cause or another. You have a right to take that evidence into consideration and determine whether the loss of fish which has been testified to here, that is, I mean the loss in spoiled cans, was any more than the usual loss that occurs in operations of that kind. If there were not, then the plaintiff has performed the contract as it is contemplated by the law he should have performed it—with due diligence; although not such as to absolutely preclude any loss of fish through faulty work, nevertheless in such a way that has avoided a loss which is unusual or beyond that which is ordinarily experienced in such work.”

To which an exception was note.

14. The Court erred in instructing the jury that the word “furnish” means “delivered.” To which exception was noted.

15. The Court erred in refusing to instruct the jury that the plaintiff could not recover upon the first count of his Complaint.

16. The Court erred in refusing to instruct the jury as requested by the defendant as follows:

“In connection with the fish supplied by the defendant to the plaintiff at the former’s cannery, I charge you that the evidence shows that after the heavy run of fish commencing on July first had continued for several days, the Superintendent of the cannery limited his fishermen

so that they would bring into the cannery a less number of fish than they otherwise would have done. [167]

I charge you that even if you should believe that the defendant did not actually produce at the cannery each day sufficient fish to have canned 2,700 cases on each day, but nevertheless if you believe from all the facts in evidence here that defendant would have produced sufficient fish to have so canned 2,700 cases each day, except only for the limit so as aforesaid placed upon its fishermen, and if you believe furthermore that the defendant at all times during this period had on hand at its cannery ready for delivery to plaintiff's men more fish than plaintiff actually canned, then I charge you that the defendant has complied fully with the obligations imposed upon it by its contract so far as furnishing fish is concerned."

17. The Court erred in refusing to instruct the jury as requested by defendant as follows:

"In relation to the damages suffered by the defendant, if any, by reason of the failure of the plaintiff to can 2,700 cases per day, I charge you that the clause in said contract to the effect that the plaintiff, Chin Quong, will forfeit to the defendant, Alaska Fishermen's Packing Company, the sum of \$1.00 per case for each case which the plaintiff shall fail to put up in order to make 2,700 cases per day, is void."

"The Civil Code of the State of California provides as follows (section 1671):

“ ‘The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.’

“And section 1670 of the Civil Code of the State of California provides:

“ ‘Every contract by which the amount of damage is to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.’

“I now charge you that from the nature of the facts presented here it was not impracticable or extremely difficult to fix the actual damage which the defendant would suffer by reason of the failure of the plaintiff, Chin Quong, to pack 2,700 cases per day, and therefore I instruct you to disregard the said contract damage of \$1.00 per case, and that it shall not furnish any basis to you for estimating such damage, but that you must be governed by the actual damages which the facts show the defendant suffered in this connection. If, therefore, you believe that these actual damages exceed the said sum of \$1.00 per case, you will give credit to the defendant therefor. And if you believe that the actual damages suffered by the defendant in this regard are less than \$1.00 per case, [168] then you can give

to the defendant only the amount so actually suffered."

We approve the foregoing Bill of Exceptions.

JOHN T. THORNTON,

Atty. for Plff.

CHICKERING & GREGORY,

Attys. for Defendant and Cross-complainant.

**Order Settling, Allowing and Certifying Bill of
Exceptions.**

The settlement of the foregoing Bill of Exceptions having been regularly continued until the present, term of this Court, and said Bill of Exceptions being now presented in due time and found to be correct, the same is hereby settled, allowed and certified, the portions lined out in red ink being stricken out and eliminated.

Dated, this 20th day of January, 1912.

WM. C. VAN FLEET,

United States District Judge for the Northern
District of California.

[Endorsed]: Filed Jan. 20, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [169]

*In the United States District Court, Northern Dis-
trict of California, Division 2.*

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Petition for Writ of Error.

The above-named defendant, Alaska Fishermen's Packing Company, a corporation, feeling itself aggrieved by the order of this Court and the judgment entered against it in this cause, comes now, by its attorneys, and petitions this Court for an order allowing it to prosecute a Writ of Error in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which said defendant shall give and furnish upon said Writ of Error, conditioned as required by law and in cases where a supersedeas and stay of execution are desired.

Dated this 18th day of July, A. D. 1912.

G. C. FULTON,

CHICKERING & GREGORY,

Attorneys for Defendant.

[Endorsed]: Filed July 18, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [170]

In the United States District Court, Northern District of California, Division 2.

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the defendant herein and files the following assignment of errors upon which it will rely on the prosecution of its writ of error in the above-entitled cause:

I.

That the Court erred in overruling the objection of defendant to the introduction in evidence of a purported assignment from the Quong Kee Co. to plaintiff, which assignment was marked "Plaintiff's Exhibit 3," and to which ruling defendant's Exception No. 1 was taken.

II.

That the trial Court erred in overruling the objection of the defendant to the admission of the sales' accounts of the defendant for the year 1910, which said sales' accounts were marked Plaintiff's Exhibits "O" and "N," and to which ruling defendant's Exception No. 5 was taken. [171]

III.

That the Court erred in overruling the motion of defendant to strike out the answer given by witness Kep Yung as a part of plaintiff's case in chief, concerning the machinery and the efficiency of the machinery of the defendant company, upon the ground that it was not within the issues made by the complaint, and to which ruling defendant's Exception No. 6 was taken, notwithstanding the fact that at a subsequent stage of the trial the said evidence was eliminated by the Court.

IV.

That the Court erred in denying the motion of the defendant for a nonsuit, made by the defendant to the first cause of action set forth in the complaint, to which defendant's Exception No. 7 was taken.

V.

That the Court erred in sustaining the objections of the plaintiff to the second of the following questions asked by the defendant of the witness W. F. McGregor:

“Q. During the year 1910 did Alaska red salmon have a standard market price in the markets of the world? A. Yes.

Q. What was that value at the Port of Astoria or San Francisco?”

To which defendant's Exception No. 8 was taken.

VI.

That the Court erred in refusing to allow the defendant to make any showing as to the market value of canned salmon during the year 1910, to which ruling defendant's Exception No. 9 was taken.

VII.

That the Court erred in declining to allow the defendant to introduce evidence to prove the following offer made by the defendant at the trial, and to which ruling defendant's [172] Exception No. 9 was taken.

“We offer to show that the market value of salmon at this time and place, at the nearest market to the cannery, was \$5.40 per case. We offer to show that the cost of procuring the fish, of canning the salmon and marketing them, in-

cluding brokerage, cartage and transportation was \$3.90, and that the difference so-called between that and \$5.40 would be our actual loss on each case of salmon which the plaintiff failed to can in accordance with the contract. We offer further to prove that the market value of the cans of salmon which were left at the cannery, some 2,045 cases in all was a certain sum, namely, \$5.40, if they had been properly canned, at the nearest available market, and that the cost of mending those cans and transportation to market and marketing the same, including brokerage and transportation, would have been \$3.22."

VIII.

That the Court erred in sustaining the objection of the plaintiff to the following question asked by the defendant of the witness W. F. McGregor:

"Q. Mr. McGregor, have you had any complaints from customers who have bought these cans for the season of 1910, since the season was over?"

To which ruling defendant's Exception No. 10 was taken.

IX.

That the Court erred in refusing to allow the witness P. A. Berglund to answer the following question asked by defendant:

"Q. Where were these piles?" (Referring to piles of canned salmon.)

And also in refusing to allow the same witness to state how many piles of canned salmon there were

in the lot of 2,045 cases, to which rulings defendant's Exception No. 12 was taken.

X.

That the Court erred in instructing the jury as follows:

“One of the questions in the case which has given rise to considerable evidence and controversy is the question as to whether a sufficient number of fish were supplied by the defendant to the plaintiff to pack the number stipulated in the contract, to wit, 2,700 cases per day. Now, you will review that evidence carefully [173] in your minds and determine whether it has been shown on the part of the defendant in its counterclaim that this contract has not been carried out, that it did furnish sufficient fish to enable the plaintiff to pack the number of cases required by the contract, and if it did, and through the failure of the plaintiff, and without fault on the part of the defendant, the plaintiff has failed to pack that number of fish, why then, of course, as I have heretofore instructed you, the plaintiff will have been shown to have breached this contract, to have failed to fulfill it, and the result would follow which I have already indicated.

“And in that connection, as has been argued to you by counsel, fish are only delivered under this contract by the defendant to the plaintiff if they are delivered in the manner and at the place designated in the contract, and, as I have suggested, with the terms of that contract you

are familiar and you will recall where it was required that these fish should be delivered.”

To which an exception was noted by defendant.

XI.

That the Court erred in not including in the foregoing instructions a statement to the effect that the defendant was only required to furnish fish to plaintiff as required by the plaintiff, to which defendant noted an exception.

XII.

That the Court erred in instructing the jury as follows:

“As I have suggested, the plaintiff is required, in order to recover upon his contract, to show that he has performed the stipulations of that contract on his part. Now, he has performed that contract if he has done the work called for with the skill, diligence and efficiency usually obtaining in such work. There has been evidence put before you here as to that class of work and what the usual result is in putting up a large pack of fish, as to the number of cans or cases in a given number that will usually be spoiled or destroyed through one cause or another. You have a right to take that evidence into consideration and determine whether the loss of fish which has been testified to here, that is, I mean the loss in spoiled cans, was any more than the usual loss that occurs in operations of that kind. If there were not, then the plaintiff has performed the contract as it is contemplated by the law he should have performed

it—with due diligence; although not such as to absolutely preclude any loss of fish through faulty work, nevertheless in such a way that has avoided a loss which is unusual or beyond that which is ordinarily experienced in such work.” To which an exception was noted by defendant. [174]

XIII.

That the Court erred in instructing the jury that the word “furnish” means “delivered,”—to which an exception was noted by defendant.

XIV.

That the Court erred in refusing to instruct the jury that the plaintiff could not recover upon the first count of his complaint,—to which an exception was noted by the defendant, *to which an exception was noted by the defendant.*

XV. .

That the Court erred in refusing to instruct the jury as requested by defendant as follows:

“In connection with the fish supplied by the defendant to the plaintiff at the former’s cannery, I charge you that the evidence shows that after a heavy run of fish commencing on July first had continued for several days, the Superintendent of the cannery limited his fishermen so that they would bring into the cannery a less number of fish than they otherwise would have done.

“I charge you that even should you believe that the defendant did not actually produce at the cannery each day sufficient fish to have

canned 2,700 cases on each day, but nevertheless if you believe from all the facts in evidence here that defendant would have produced sufficient fish to have so canned 2,700 cases each day, except only for the limit so as aforesaid placed upon its fishermen, and if you believe furthermore that the defendant at all times during this period had on hand at its cannery ready for delivery to plaintiff's men more fish than plaintiff actually canned, then I charge you that the defendant has complied fully with the obligations imposed upon it by its contract so far as furnishing fish is concerned."

To which an exception was noted by the defendant.

XVI.

That the Court erred in refusing to instruct the jury as requested by defendant as follows:

"In relation to the damages suffered by the defendant, if any, by reason of the failure of the plaintiff to can 2,700 cases per day, I charge you that the clause in said contract to the effect that the plaintiff, Chin Quong, will forfeit to the defendant, Alaska Fishermen's Packing Company, the sum of \$1.00 per case for each case which the plaintiff shall fail to put up in order to make 2,700 cases per day, is void. [175]

"The Civil Code of the State of California provides as follows (Section 1671):

" 'The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it

would be impracticable or extremely difficult to fix the actual charge.'

"And section 1670 of the Civil Code of the State of California provides:

"'Every contract by which the amount of damage is to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.'

"I now charge you that from the nature of the facts presented here it was not impracticable or extremely difficult to fix the actual damage which the defendant would suffer by reason of the failure of the plaintiff, Chin Quong, to pack 2,700 cases per day, and therefore I instruct you to disregard the said contract damage of \$1.00 per case, and that it shall not furnish any basis to you for estimating such damage, but that you must be governed by the actual damages which the facts show the defendant suffered in this connection. If, therefore, you believe that these actual damages exceed the said sum of \$1.00 per case, you will give credit to the defendant therefor. And if you believe that the actual damages suffered by the defendant in this regard are less than \$1.00 per case, then you can give to the defendant only the amount so actually suffered."

To which an exception was noted by the defendant.

WHEREFORE, the said defendant, plaintiff in error herein, prays that the judgment of the said trial Court be reversed, and that the said District

Court of the United States for the Northern District of California, Division No. 2, be directed to grant a new trial of said cause.

G. C. FULTON,

CHICKERING & GREGORY,

Attorneys for the Plaintiff in Error, Defendant below.

[Endorsed]: Filed July 18, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [176]

In the United States District Court, Northern District of California, Division No. 2.

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

The above-named defendant, having this day filed its petition for a Writ of Error from the judgment entered herein to the United States Circuit Court of Appeals, for the Ninth Circuit, together with the assignment of errors,—all in due time, and praying that an order be made fixing the amount of security which plaintiff shall furnish on said Writ of Error, and that, upon the giving of said security, all proceedings in this Court be stayed, pending the deter-

mination of said Writ of Error:

IT IS HEREBY ORDERED that a Writ of Error herein is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the Ninth Circuit; and,

IT IS HEREBY FURTHER ORDERED that upon the said defendant Alaska Fishermen's Packing Company, a corporation, on filing with the Clerk of this Court a good and sufficient bond in the sum of [177] Twenty-five Thousand (\$25,000.00) Dollars, to the effect that if said defendant and plaintiff in error, Alaska Fishermen's Packing Company, a corporation, shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void; otherwise to remain in full force and virtue.

Said bond to be approved by the Court, and all further proceedings in this court be and are hereby suspended and stayed, until the determination of said Writ of Error by the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at San Francisco, California, this 18th day of July, A. D. 1912.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jul. 18, 1912. Jas. P. Brown,
Clerk. J. A. Schaertzer, Deputy Clerk. [178]

In the United States District Court, Northern District of California, Division 2.

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COMPANY, a Corporation,

Defendant.

Bond on Appeal.

Know All Men by These Presents: That we, Alaska Fishermen's Packing Company, a corporation, as principal, and Herbert Fleischacker and C. F. Hunt, as sureties, are held and firmly bound unto Chin Quong, the plaintiff above named, in the sum of Twenty-five Thousand (\$25,000.00) Dollars, to be paid to the said Chin Quong, his heirs, executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, representatives and assigns, firmly, by these presents.

Sealed with our seals and dated the 18th day of July, 1912.

Whereas, the defendant above named has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment entered in the above-named Court in favor of said plaintiff and against said defendant [179] in the sum of Twenty Thousand One Hundred and

Ninety-two and Ten-hundredths (\$20,192.10) Dollars, together with Five Hundred and Twenty-four and Five Hundredths (\$524.05) Dollars costs of suit:

Now, therefore, the condition of this obligation is such that, if the above-named defendant shall prosecute said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise, it shall be and remain in full force, virtue and effect.

WITNESS our names and seals, hereto affixed, this 18th day of July, A. D. 1912.

ALASKA FISHERMEN'S PACKING
COMPANY,

Principal.

By CHICKERING & GREGORY,

Its Attorneys.

HERBERT FLEISCHACKER,

Surety.

C. F. HUNT,

Surety. [180]

State of California,

City and County of San Francisco,—ss.

Herbert Fleischacker and C. F. Hunt, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself and not one for the other, deposes and says, that he is a resident and householder in said State of California, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

HERBERT FLEISCHACKER,
C. F. HUNT.

Subscribed and sworn to before me this 18th day of July, A. D. 1912.

[Seal]

M. I. LAWRENCE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires January 27, 1914.

The foregoing bond is hereby approved, both as to substance and form.

Dated July 18th, 1912.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed July 18, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [181]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,289.

CHIN QUONG,

Plaintiff,

vs.

ALASKA FISHERMEN'S PACKING COM-
PANY, a Corporation,

Defendant.

Clerk's Certificate to Transcript of Record.

I, Jas. P. Brown, clerk of the District Court of the United States in and for the Northern District of California, do hereby certify the foregoing one hundred and eighty-one (181) pages, numbered from 1 to 181, inclusive, to be a full, true and correct copy

of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said District Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$115.70; that said amount was paid by Messrs. Chickering & Gregory, attorneys for the above-named defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of August, A. D. 1912.

[Seal] JAS. P. BROWN,
Clerk of the United States District Court, Northern
District of California.

By W. B. Maling,
Deputy Clerk. [182]

[Writ of Error.]

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable
the Judges of the District Court of the United
States for the Northern District of California,
Second Division, Greeting:

Because in the record and proceedings and also
in the rendition of the judgment of a plea, which is
in said District Court before you, or some of you,
between Chin Quong, plaintiff and defendant in er-
ror, and Alaska Fishermen's Packing Company, a
corporation, defendant and plaintiff in error, a mani-

fest error hath happened, to the great prejudice of the said Alaska Fishermen's Packing Company, a corporation, the said defendant and plaintiff in error, as by its complaint and assignment of errors appears, we, being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the seventeenth day of August next, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done. [183]

Witness the Honorable WM. C. VAN FLEET, United States District Judge, Northern District of California, the nineteenth day of July, in the year of our Lord one thousand nine hundred and twelve.

[Seal]

JAS. P. BROWN,

Clerk of the District Court of the United States for the Northern District of California.

By J. A. Schaertzer,

Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,

Judge. [184]

Due service of the within Writ of Error and receipt of a copy is hereby admitted this 22d day of July, 1912.

JOHN T. THORNTON,

Attorney for Plaintiff and Defendant in Error.

The Answer of the Judges of the District Court of the United States for the Northern District of California, Second Division.

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify, under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within, contained in a certain schedule to this writ annexed, as within we are commanded.

By the Court,

[Seal]

JAS. P. BROWN,

Clerk.

By W. B. Maling,

Deputy Clerk.

[Endorsed]: No. 15,289. In the District Court of the United States, Northern District of California, Second Division. Chin Quong, Plaintiff, and Defendant in Error, vs. Alaska Fishermen's Packing Company, a Corporation, Defendant and Plaintiff in Error. Writ of Error. Filed Jul. 22, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [185]

[Citation.]

UNITED STATES OF AMERICA,—ss.

The President of the United States to Chin Quong,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the seventeenth day of August, A. D. 1912, being within thirty days from the date hereof, pursuant to a writ of error, issued in the Clerk's office of the District Court of the United States for the Northern District of California, Second Division, wherein Alaska Fishermen's Packing Company, a corporation, is the defendant and plaintiff in error, and you are the plaintiff and defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WM. C. VAN FLEET,
United States District Judge for the Northern District of California, this nineteenth day of July, A. D. 1912.

WM. C. VAN FLEET,

United States District Judge. [186]

Due service of the within Citation and receipt of a copy is hereby admitted this 22d day of July, 1912.

JOHN T. THORNTON,

Attorney for Plaintiff and Defendant in Error.

[Endorsed]: No. 15,289. In the District Court of the United States, Northern District of California, Second Division. Chin Quong, Plaintiff and Defendant in Error, vs. Alaska Fishermen's Packing Company, a Corporation, Defendant and Plaintiff in Error. Citation. Filed Jul. 22, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2173. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Fishermen's Packing Company, a Corporation, Plaintiff in Error, vs. Chin Quong, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed August 16, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2173

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA FISHERMEN'S PACKING COMPANY (a corporation), vs. CHIN QUONG,	}	<i>Plaintiff in Error,</i> <i>Defendant in Error.</i>
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BRIEF FOR PLAINTIFF IN ERROR.

G. C. FULTON,
CHICKERING & GREGORY,
Attorneys for Plaintiff in Error.

Filed this.....*day of October, 1912.*

... *FRANK D. MONCKTON, Clerk*

By.....*Deputy Clerk.*

No. 2173

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ALASKA FISHERMEN'S PACKING

COMPANY (a corporation),

Plaintiff in Error,

VS.

CHIN QUONG,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

This is upon a writ of error from the United States District Court for the Northern District of California, Second Division, to review a judgment based upon a verdict adjudging that the defendant in error (plaintiff below) was entitled to recover from the plaintiff in error (defendant below) the sum of \$20,192.10 and costs.

The parties to this action are Alaska Fishermen's Packing Company, a corporation created under the laws of Oregon and operating a cannery for the canning of salmon at Nushagak, Bristol Bay, Alaska. The defendant in error (plaintiff below)

is a Chinese contractor. We shall hereafter speak of these parties as they were aligned in the court below.

The complaint is arranged in three counts or causes of action. The first is upon a written agreement, a copy of which is attached to the complaint; the second is for the sum of \$1671.40 for work and labor alleged to have been performed for defendant by plaintiff in assembling and nailing up 26,000 box shooks; the third is *indebitatus assumpsit* for work and labor done for the same sum as is claimed in the first cause of action. In other words, the plaintiff counted both upon an express and implied contract.

The contract (pp. 6-12) was entered into between the parties on November 20, 1909, and had reference to the canning season of 1910. Thereby the plaintiff, Chin Quong, agreed to furnish all the skilled and unskilled labor that would be required to prepare and put up all the fish that could reasonably be expected to be had at the cannery, upon certain conditions, which may be summarized as follows:

1. To furnish 140 men, of which 67% should be Chinese, including three testers.

2. To receive the fish on the wharf at Nushagak, clean and prepare them, transport them to the cannery, place the fish in cans, solder, wash, pile, label and put the cans in cases and nail up the entire pack of the season; also to put in one small piece of tin inside the can, on top of the fish.

3. To mend all leaks by skilled labor daily.

4. To do all the work under the direction and supervision of the superintendent of the cannery and to his entire satisfaction, and with the utmost diligence, speed and care and in the most complete and workmanlike manner.

5. To weigh all the cans after being filled and to pay the defendant Alaska Fishermen's Packing Company for any trays, tools, coolers, machinery and other articles used by the men of the plaintiff which might be wasted or destroyed or broken by their carelessness.

6. To furnish all candles, lamps and coal oil necessary to be used for any work, and to perform the labor required at all times, nights and Sundays not excepted, whenever deemed necessary and ordered by the superintendent of the cannery.

7. To pay for all outside help necessary to assist the Chinese engaged under the contract.

8. To lacquer and label not less than 3600 cases per day during the fishing season, and after the close of the season to put on all the labor required to finish the balance of the pack in the shortest possible time.

9. To put up not less than 2700 cases of fish per working day, provided the necessary fish for that purpose were furnished by the company.

The defendant below, Alaska Fishermen's Packing Company, on its part agreed:

1. To pay Chin Quong 55 cents for each case containing four dozen tall cans of one pound each when filled by the Jensen can-filling machines, and 60 cents per case containing four dozen tall cans each when filled by hand.

2. To pay one cook and three testers \$50 per month until the return to San Francisco, and \$75 to a Chinese foreman.

3. To furnish free transportation from San Francisco and return for all men employed under the contract, their provisions and baggage, and to furnish water, fuel and a habitable house to live in while at the cannery.

4. To make as advance payments one hundred dollars for each man, before the sailing of the vessel from San Francisco. It is admitted in the complaint that this advance payment was made.

5. To guarantee that the pack would reach 66,000 cases, and if the amount should be less than that, to pay the contractor the same as if the pack had been that amount. If the pack exceeded 66,000 cases, then each case was to be paid for at the price agreed upon in the contract.

The contract contains other provisions relative to the contingency of destruction of the cannery or materials, which are not material to this record.

To this complaint defendant filed an answer and counterclaim. The answer (pp. 53-66) denied that plaintiff had performed all the conditions imposed upon him by the contract; admits that it has paid

contractor \$14,000, and no more, but alleges that it had laid out for the use and benefit of plaintiff and at his request moneys amounting to \$1331.30. In its counterclaim defendant alleged that plaintiff had failed to furnish 140 competent men and that by reason of their incompetency the defendant had been damaged in the following particulars:

1. That plaintiff's crew were unable to handle the fish furnished them between July 2 and July 13 to the guaranteed amount of 2700 cases per day, and that by reason thereof defendant was obliged to destroy 31,698 salmon which were reasonably worth \$1911.39.

2. That by reason of the inability of plaintiff's men to handle the fish furnished them, defendant was obliged to limit its fishermen so that it did not obtain 36,600 salmon that would otherwise have been caught by the fishermen, although it was obliged to pay these fishermen the same as if this limit had not been placed, and that it paid the fishermen \$2206.98 on account of this guaranty.

3. That 2045 cases of canned salmon were left at the cannery, as leaky cans, because the leaks therein were not mended by plaintiff's crew.

The counterclaim alleges this loss in two forms: one based upon the sum of \$3.00 per case, as provided in the contract for liquidated damages, and the other for the actual damages suffered.

4. That plaintiff's crew between July 2 and July 13 failed to pack 2700 cases of salmon per day

in accordance with the agreement, by 6376 cases, and the damage sustained thereby is also pleaded, both for the penal sum of \$1.00 per case provided in the contract and for the actual damage.

The total sum claimed by defendant under its counterclaim is \$36,207.33, and defendant prayed for judgment against the plaintiff for the difference between this sum and \$23,971.40.

The plaintiff below, as his case in chief, produced three witnesses: the plaintiff, Chin Quong, the Chinese foreman, Kep Yung, and read the deposition of E. P. Nounan, defendant's secretary.

The plaintiff testified (p. 76) that he did not go to Nugashak or on board the ship, and did not see the men go aboard. His testimony previously given (pp. 72-73) as to the number of men whom he had placed on board was stricken out. There is nothing in Chin Quong's testimony material to the case, excepting the matter of the assignment from Quong Kee Co. to himself; this assignment (p. 75) he testified that he, as a member of Quong Kee Co., executed to himself, and this document was admitted over defendant's objection (p. 75).

Kep Yung, the foreman, testified that he took up with him 140 men, 81 Chinese, 49 Japanese, and 10 Mexicans, and that they were skilled laborers; that they packed about 44,000 cases of salmon, which was taken on board defendant's ship. Upon direct examination he testified that all the salmon furnished was canned and that two or three times it

happened that they could not cook all the salmon and they were spoiled; that they canned over 1000 cases per day. Upon cross-examination this witness testified that he met with an accident on the ship and was on crutches during the season; that he did not see with his own eyes how many red salmon were thrown away, because he did not dare to walk out.

This witness was not asked, nor did he testify, that the Chinese crew had performed the obligations imposed upon them by the contract. He merely said that they packed about 44,000 cases of salmon which were taken on board defendant's ship, and that all the salmon that was furnished was canned. This latter statement, however, was qualified by his other statements to the effect that some red salmon were thrown away because they could not cook them; and, upon cross-examination, to the effect that they were furnished enough fish to can 2700 cases a day between July 2nd and July 13th, but that they were not canned because it was beyond the capacity of the soldering machines. We shall hereafter discuss this testimony more in detail.

This witness further said that when the ship sailed on its homeward voyage there were six or seven hundred cases of salmon left upon the wharf the leaks in which were not mended because they were called to come back to San Francisco.

Upon redirect examination the witness was permitted to state, over defendant's objections (pp.

84-88) that the solder machine and other machinery was defective. This testimony concerning the machinery was afterwards eliminated by the trial court.

The only remaining witness whose testimony was read for plaintiff as a part of his case in chief, was that of E. P. Nounan, secretary of the defendant, through whom was introduced defendant's sales account for the year 1910.

At the close of plaintiff's testimony a motion for nonsuit (p. 92) was made, to which we refer more fully hereafter.

The defendant below in its behalf called its superintendent Berglund, its cannery foreman Young, its bookkeeper Jonsson, its employee Johansen, and its president, McGregor. These witnesses, except McGregor, stated that the contractor's employees were not experienced men and that they were unable to handle the fish delivered to them, by reason of which they were obliged to curtail the fishermen in their catch and to throw away large quantities of fish, and that 2045 cases of canned salmon were left at the cannery because they were improperly packed, and had spoiled.

The process of canning in detail was shown by Berglund (pp. 94-6). He then stated that the contractor's men began to be slow in taking the cans out of the soldering machine on the first day of the run and that this slowness continued throughout the season; that in consequence the cases were piled

up in the cannery to such an extent that they were obliged to slow down and stop the machines so as to let them be cleared up. He further stated that he had contracts with fishermen by which he agreed to take from each boat not exceeding 1200 fish per day, for which amount he was obliged to pay, whether they received the fish or not; that when the Chinamen were unable to handle the fish in the cannery he limited the boats, taking off some, and restricting the catch in the others; that there were cases of salmon left at the cannery when the ship sailed, which he personally counted (p. 98).

A large portion of the testimony of this witness was also devoted to the character and efficiency of the machinery, all of which testimony was at a later time eliminated by the trial court.

The difficulty with the Chinese crew occurred in a heavy run of fish between the 1st and 14th days of July. The defendant below proved by its book-keeper Jonsson the number of cases that were packed each day during that period (pp. 134-135), the number of fish which were delivered at the cannery, and also the number of fish that were left over at the conclusion of each day's pack (p. 136). The witness Jonsson further stated that on July 8th they threw away 23,619 fish and on July 9th 8079 fish because the Chinese crew could not pack them.

It will be observed from the numbers given that there were left over each day to and including July 13th more than sufficient fish to can 2700 cases.

Defendant's witness Young (pp. 126-133) testified that the Chinese crew were unable to keep up with their work and that he was obliged to slow down the machines on that account, and that he counted 2260 cases of salmon that were left at the cannery because they were swells and had commenced to spoil.

Defendant's witness Johansen (p. 159) testified that he had seen the cans left at the cannery and estimated that there were over 2000 cases; that he had a conversation with the Chinese foreman concerning them and that the foreman said he was not going to fix them, but that it was better for the boss at home to fix it up; that the cans were spoiled because they were not fixed at the right time; that in his judgment as a salmon cook, this crew could not put up over 1800 cases per day.

In rebuttal plaintiff produced the witness Soo Hoo Yen, who stated that two of the men who went up on the ship to defendant's cannery were men that he had sent to another cannery in that district, and that these men did not work at defendant's cannery.

The witness Yee Chat (p. 168) testified that there were about 400 or 500 cases of salmon left at the cannery because they were damaged seams and not cooked; that at the time they were called away 12 men were working on the pile and that if they had had sufficient fire they could have been finished in one or two days. This witness, it will be noted, said

in response to a question by the Court that these cans left at the cannery were not *even cooked* (p. 168).

The witness Gray, who testified that some cans were left in the cannery and that he, upon walking through, saw in the warehouse a pile, probably about 16 feet wide and 15 feet long and between 3 and 4 feet high, and that he saw a small pile opposite this one.

The witness Story, who testified that in all cannery operations there would be from 300 to 500 cases which would be bruised, smashed and jammed and would inevitably accumulate during the season.

This was substantially all the testimony in the case which was finally allowed to stand. There was much testimony concerning the efficiency of defendant's machinery which was eliminated, as we hereafter will explain. There was also some testimony concerning the use or non-use by the Chinese of what is known as the "mallet" test, which testimony we also do not consider material to this record.

Argument.

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION
FOR A NONSUIT TO THE FIRST CAUSE OF ACTION SET
FORTH IN THE COMPLAINT (Defendant's Exception 7, p. 92.)

An examination of the contract will show that the parties therein contracted as owner and con-

tractor. In no sense was their relationship that of employer and employee. They stood at arm's length. The company paid the contractor \$14,000 upon the sailing of the expedition from San Francisco, and it stood to lose this sum and all its other expense connected therewith if for any reason they were not able to secure sufficient fish, or the expedition should fail to reach its destination. The company also guaranteed the pack to reach 66,000 cases.

These obligations of the company had corresponding obligations imposed upon the contractor, and for that reason a bond was exacted from him. He took upon himself the full responsibility to put up all the fish that could reasonably be expected, at the cannery, to the extent of 2700 cases per day. The contract is emphatic upon this point, because its concluding paragraph (p. 20) is:

“And it is expressly understood that the party of the first part is to put up not less than 2700 cases of fish per working day, provided they are furnished with the necessary fish for that purpose by the party of the second part.”

It will be noted that when the plaintiff rested his case in chief the evidence concerning the fulfillment of the contract on his part was extremely meager. It is limited to the testimony of the witness Kep Yung, because his only other witnesses, Chin Quong and Nounan, did not go to the cannery and had no personal knowledge of the pack. It is furthermore evident that the theory upon which this case was tried by plaintiff was that the plaintiff did *not* pack

his 2700 cases per day, although furnished with fish, *but that his failure so to do was caused by defective machinery.* Under no other supposition could the testimony concerning the machinery have been necessary, and by far the greater portion of plaintiff's testimony is devoted to this subject.

If plaintiff packed all the fish furnished there was no necessity of saying anything about defective machinery.

This testimony concerning machinery was all given under defendant's objection and exception, it invoking the rule that plaintiff could not count in his complaint upon the full performance of his contract and then set up in evidence reasons why he failed to so perform; that he could not allege that the plaintiff had performed all the obligations imposed upon him by the contract and then show that he did not so do, and hope to sustain his case as pleaded. For this rule of law defendant relied upon

Daley v. Ross, 86 Cal. 115;

Estate Warren, 158 Cal., p. 445,

which squarely decide this point.

The evidence concerning the machinery was at first admitted by the trial court, and it was not until the defendant (p. 125) had proceeded with the testimony of one witness, Berglund, that the court ruled that the evidence already introduced tending to show inadequacy or improper condition of the

implements and machinery was inadmissible under the pleadings and he should therefore eliminate the same, and this evidence was stricken out.

This evidence being stricken out, there remains but a few words of testimony to sustain plaintiff's entire case in chief. The contract imposed many and stringent obligations upon the plaintiff. No witness was asked or testified that these obligations were fulfilled, e. g.:

1. He did not show that all leaks had been mended by skilled labor daily, as the contract provides (p. 7). No witness for plaintiff was asked this question, or answered it. To the contrary the only showing was that these leaks were not mended as required, because Kep Yung testified that some 600 or 700 cases of leaky cans (p. 83) were left on the wharf on which they were working.

2. He did not show that his men performed all the labor required of them by the contract (p. 8); this question was not asked or answered.

3. The plaintiff did not show that his men lacquered and labeled not less than 3600 cases per day during the fishing season and that after the close of the season he finished up the balance of the pack in the shortest possible time. Concerning this affirmative showing (p. 11) no witness was questioned.

4. Especially did the plaintiff fail to show that his men put up not less than 2700 cases of fish per

working day when furnished with the necessary fish for that purpose.

The character of the business must at once indicate that this ability to put up 2700 cases per day was an essential part of the plaintiff's undertaking, upon which the defendant company relied, for, as the testimony shows, it is impossible to anticipate when the heavy run of fish will begin, and all of the pack of the season must be handled in a very few days. During the season in question (1910) the pack was practically completed between the 1st and 14th days of July. The fish must be packed shortly after they are caught or they will spoil, and the government regulation is that they must be canned within 48 hours after they are caught (p. 102).

We are not here concerned with the compensation due plaintiff for the cases that were actually packed. The first cause of action is upon the contract, and is to recover for the amount *guaranteed*, viz.: 66,000 cases. Before defendant could be held upon its guaranty it was of course essential that the plaintiff *prove* his allegation that he had performed "all the covenants, stipulations and conditions on his part to be performed". The mere introduction in evidence of the contract would of course not supply this proof.

Now, when plaintiff closed his case, all the evidence that had been introduced concerning the fulfillment of the contract, with the exception of the testimony concerning the defective machinery,

which was subsequently eliminated, is embraced within a very few words of the witness Kep Yung. He stated that he took up with him 140 men, 81 Chinese, 49 Japanese, and 10 Mexicans, and that they were skilled laborers; that they commenced to work at the cannery about the middle of the Chinese second month and worked until about over the middle of the Chinese seventh month; that they packed about 44,000 cases of salmon, which were taken on board defendant's sailing ships; that all the salmon they furnished us to pack was canned, and then he testified upon direct examination (p. 78):

“Q. Were any of the red permitted to spoil and were thrown away because your men could not pack them?

A. No, there was no reason of that kind.

Q. Were any of the reds permitted to spoil after they were caught?

A. *If we did not get them all done, some of them would spoil.*

Q. *Did it occur that there were any times when they could not cook them all and they were spoiled?*

A. *Sometimes.*

Q. How many?

A. Well, I could not say how many were spoiled.

Q. How often did that occur?

A. Two or three times that happened.”

And upon cross-examination (p. 80):

“Q. Do you remember when there was a very heavy run of fish between the 2nd and 13th of July?

A. Yes.

Q. There were a great many fish left at the cannery each one of those days, were there not? I mean brought to the cannery on each one of those days?

A. Yes.

Q. About how many thousand fish a day, if you know, were brought to the cannery on those days, each day?

A. I don't know how many; I could not say how many.

Q. How many fish does it take to make a case of salmon?

A. Sometimes one fish will make three cans and sometimes two and a portion of a can.

Q. Did you ever can 2700 cases on any single day that season?

The COURT. You had better find out first if they ever had fish enough furnished them to can that many.

Q. During the time I have named, that is, between the 2d and the 13th of July, was there not fish each day brought to the cannery sufficient to can 2700 cases?

A. Well, according to this float, this float was overrun, that is all they could run over the float every day.

Q. You mean run over with fish?

The INTERPRETER. As many cans as they could run over the soldering, as I understand.

Q. Did you have enough fish to can 2700 cases a day during that time?

A. Yes, *there were enough fish*, but it was beyond the capacity of the soldering machines.

COUNSEL FOR DEFENDANT. I ask that the last portion of the answer go out as not responsive.

The COURT. I will let the answer stand.

COUNSEL FOR DEFENDANT. We note an exception.

(Defendant's Exception No. 2.)

(Subsequently the said matter concerning the machinery was eliminated, as hereinafter shown.)”

This was all the testimony on the part of the plaintiff that he had performed his contract. At the conclusion of this evidence a motion for a non-suit so far as the first cause of action was concerned was made, and it was to the point that the evidence showed that plaintiff did not pack 2700 cases of fish per day when furnished with fish for that purpose, and therefore it appeared that the plaintiff had not complied with all the provisions of the contract imposed upon him.

It is submitted that this motion should have been granted, because the proof had totally failed to show that the plaintiff had

“put up every working day during the term of this agreement all the fish that could reasonably be expected to be had at the cannery, say 2700 cases, or more if possible”.

The testimony of the one witness Kep Yung must be taken as a whole. It is true that he first stated that all the salmon furnished was canned; *neither he nor any other witness testified that this was done in accordance with the terms of the contract*, and in the next breath he stated that some of the red salmon were not cooked and were spoiled, and further that he was between July 2nd and July 13th furnished with enough fish to can 2700 cans a day, but that it was beyond the capacity of the soldering machines. This latter statement being eliminated,

we have the only direct statement on the part of the plaintiff, as follows:

“Q. Did you have enough fish to can 2700 cases a day during that time?

A. Yes, there were enough fish.”

And the further testimony of the same witness (p. 79) that they canned over 1000 cases of salmon a day.

Not only does this evidence not show that plaintiff complied with all the conditions of the contract imposed upon him, but it *affirmatively* shows that he did not do so. Plaintiff therefore at the conclusion of his case had failed to make a showing sufficient to warrant a recovery upon his first cause of action. Witnesses should have been produced who stated in detail that all of the conditions imposed upon the contractor were fulfilled.

When the evidence concerning the machinery was eliminated by the trial court, plaintiff was given an opportunity to amend his complaint, but declined to do so.

It is also submitted that the instruction requested by defendant (p. 212) to the effect that the plaintiff could not recover upon the first cause of his complaint should have been given.

An examination of this record will disclose the anomalous situation of a contractor being allowed to recover the full amount of his guaranty, although it is not denied that he failed in important particulars, and that in consequence thereof large

quantities of fish were thrown away. No witness was called, and no witness testified, that these fish were *not* thrown away. *There is no testimony whatever from the beginning of the record to the end, to the effect that there was a scarcity of fish during the time of the heavy run.* Upon the contrary, as already noted, plaintiff's only witness admits that some fish were thrown away, and admits that he did not can 2700 cases per day, but attributes this failure to defective machinery. This excuse having no longer justification in the evidence, we assert that it conclusively follows that upon plaintiff's own showing he did not comply with his contract to pack all the fish furnished him, up to 2700 cases.

Plaintiff below also failed to make out a case upon the contract, because he failed to show that his crew had mended all the leaks daily, as required by the contract. It is obvious that this clause of the contract is of essential importance on account of the general character of the business, the canning being only one link in the connecting chain from the catching of the fish to the loading of the canned salmon on the vessel; and if the leaks are not mended each day, all the remainder of the process must be thrown out of harmony and necessary delay and loss result. Not only is there no proof that the plaintiff did mend *all* the leaks, but it affirmatively appears from his case in chief that he did *not* do so, because the witness Kep Yung testified that they left about six or seven hundred cases at the cannery, spoiled. This was when the ship

sailed for San Francisco and some two weeks after the run of fish had ceased, so that these leaks could not have been mended *daily*.

It is submitted that it is not possible to eliminate the testimony concerning the machinery, as was done by the trial court, and leave sufficient proof for plaintiff to make out a case upon his first cause of action. This argument is independent of the causes of counterclaim. It is based upon the elementary proposition that it was essential that plaintiff in his case in chief prove the allegation of his complaint that he had performed all the obligations of the contract imposed upon him. The record we think obviously shows that plaintiff did not prove that he had *each day* canned all the fish that were furnished him, or that there was any scarcity of fish. His reliance was that he was prevented from canning these fish on account of defective machinery. If he had seen fit to amend his complaint when the ruling was made he no doubt could have introduced this testimony concerning the machinery, but since he elected not to so amend he must stand upon the strict letter of his contract, unless all rules of pleading and of proof are to be brushed aside.

There is indeed an element of humor in permitting the plaintiff to recover upon a contract and enforce a guaranty, without any substantial proof whatever that he has performed his own obligations. As noted, plaintiff as a part of his case in chief proceeded at once to the question of the defective machinery; there could have been no pos-

sible purpose in doing so if he contended that he canned all the fish furnished. Thus the theory upon which he proceeded and to which his evidence was directed was that there was a failure on his part to can all the fish furnished, but that defendant could not avail itself of this fault on account of its own failure to provide efficient machinery.

The whole of plaintiff's evidence at the conclusion of his case in chief may be summarized thus:

"I admit that I did not can 2700 cases a day, although there were plenty of fish furnished me for that purpose, and I admit that I did not mend all the leaks daily, but that my men were working on some six or seven hundred cases of leaks when the ship sailed."

This is not a case in which plaintiff was met with any difficulty of proof. If there was a scarcity of fish his hundred or more employees were as fully informed of that fact as anyone, but not one of them came forward to so state.

This record at the conclusion of plaintiff's case is similar to that presented by a contractor who had agreed to construct a building in accordance with certain plans and specifications. Does that contractor make out a case on his contract if he simply testifies that he constructed a building, without in any way stating that he did so in accordance with the plans and specifications? Still further, does he make out a case if he testifies that he did *not* comply with certain details of the plans and specifications?

II.

The evidence introduced by defendant did not supply any omissions in plaintiff's case in chief, but on the contrary showed without contradiction that plaintiff had failed to comply with his contract in many important particulars. The witness Berglund, defendant's superintendent, testified (p. 96) that the men were not able to keep up with the fish as supplied them, but that he was obliged to slow down the machinery; that the delay was so great that they were as high as 300 cases ahead in the forenoon (p. 97); that his contract with the fishermen required him to pay them for a minimum of 1200 fish per day per boat, and whether they received the fish or not, and that he was obliged to curtail the catch on account of an overrun in the cannery (p. 98); that when they left at the end of the season there were 2200 cases which he counted left, and which had begun to spoil; that these cans were leaky and that the men of plaintiff were incompetent and would not assist in mending these cans; that finally, being the last ship in the harbor, he was obliged to leave. That the fish were thrown away from the lighters alongside the dock. These fish were not put in the fish dock because they already had plenty of fish on the dock (p. 112); that the machinery and appliances at the cannery were capable of handling 3000 cases a day with 140 men (p. 120). He testified (p. 124):

“Q. Now, referring to the number of fish, commencing with the 1st day of July, and end-

ing with the 13th, was there any day upon which you did not have a surplus of fish at the end of the day?

A. No, sir, we always had plenty of fish in the evening, and could put up more if we could."

The witness Young (p. 126) testified that he was the canning foreman at the cannery; that Kep Yung, the Chinese foreman and witness, was injured before sailing from San Francisco, and that he was unable to attend to his duties during the season because of these injuries (pp. 126-127).

That he counted 2260 cases of salmon that were left at the cannery when the ship sailed for San Francisco, and that they were left there because they were swells and had commenced to spoil, because the Chinamen did not fix them up.

The witness Jonsson (p. 133) testified that he was defendant's bookkeeper during this season, and gave the total number of cases packed each day from July 1 to July 14, 1910 (p. 134). It will be noted that on none of these days, except the 14th, were 2700 cases packed, and concerning this day the witness said:

"The 2700 cases packed on the 14th were not packed entirely by the Chinese crew; they had all the assistance we could give, the white men working in the cannery and also a great many native Indians."

This witness also gave the number of fish delivered at the cannery from July 1st to July 14th. It being remembered that it took on an average

twelve fish to the case (p. 102), the number of fish necessary to pack 2700 cases would be 32,400.

This witness also stated the number of fish that were left over at the conclusion of each day's pack during this time. It will be seen that on every day from July 2d to July 13th there were 40,000 or more left over, and on some of the days from 49,000 to 93,000.

We submit that this testimony shows that at all times during this period there were more than sufficient fish at the cannery to pack 2700 cases per day. It also shows that on not one day did they pack this number, and therefore the default of plaintiff must follow and he cannot recover on his contract as pleaded.

This witness also stated that on July 8th they threw away 23,619 fish and on the 9th 8079 fish, because they had too many fish on hand and could not pack them. He also stated (p. 136) that they had 33 boats with two men each at the cannery, and 23 reserve boats at their stations, of which 14 were at Koggiung Station; and that they did not bring any fish from Koggiung. That they were obliged to pay the fishermen 3 cents per fish for 36,600 salmon which they did not catch, because the catch was restricted. That there were other fish thrown away from day to day, but not in any big quantities (p. 142), and he could not state the exact amount because no count was taken of them.

The witness Johansen (p. 159) testified that he was a salmon cook at defendant's cannery during the season of 1910; that he saw the cans that were left at the cannery when the ship sailed and estimated that there were about 2000 cases; that he had a conversation with the Chinese foreman concerning these cases the day before the ship sailed and that the foreman said that he was not going to fix the cans, but that it was better for the Chinaman to pay for them when we got home; that these cans spoiled because they were not fixed at the right time (p. 160); that in his judgment the crew could not put up more than 1800 cases per day.

Upon his redirect examination the plaintiff introduced no evidence to contradict the foregoing concerning the number of fish furnished or the cases packed. No question was asked or answered by any witness on these subjects. There was, however, some testimony concerning the number of cases left at the cannery, the witness Yee Chat stating (p. 168) that there were about 400 or 500 cases left there.

It will therefore be observed, as before noted, that *there is no conflict in this evidence concerning the failure of the plaintiff to pack all the fish that were furnished him.* The evidence is complete and uncontradicted. There was an abundance of fish to pack more than 2700 cases per day during the period in question and plaintiff failed very materially to pack that number, and thereby defendant's total pack was many thousand cases short.

If the stipulations of this contract therefore are binding at all upon the contractor, we must submit that under this affirmative showing of non-compliance the motion for a nonsuit and also the requested instruction should have been given. If his complaint had alleged the language of his proof it would not have stated a cause of action.

III.

THE COURT ERRED IN INSTRUCTING THE JURY THAT THE WORD "FURNISH" AS USED IN THE INSTRUCTIONS MEANS "DELIVER".

The court instructed the jury as follows (p. 191):

"One of the questions in the case which has given rise to considerable evidence and controversy is the question as to whether a sufficient number of fish were supplied by the defendant to the plaintiff to pack the number stipulated in the contract, to wit, 2700 cases per day. Now, you will review that evidence carefully in your minds and determine whether it has been shown on the part of the defendant in its counterclaim that this contract has not been carried out, that it did furnish sufficient fish to enable the plaintiff to pack the number of cases required by the contract, and if it did, and through the failure of the plaintiff, and without fault on the part of the defendant, the plaintiff has failed to pack that number of fish, why then, of course, as I have heretofore instructed you, the plaintiff will have been shown to have breached this contract, to have failed to fulfill it and the result would follow which I have already indicated.

“And in that connection, as has been argued to you by counsel, fish are only delivered under this contract by the defendant to the plaintiff if they are delivered in the manner and at the place designated in the contract, and, as I have suggested, with the terms of that contract you are familiar and you will recall where it was required that these fish should be delivered.”

Upon the exception of plaintiff to the instruction, the following proceedings took place:

COUNSEL FOR DEFENDANT. “We except to the instruction that we were to deliver to the cannery at the place named; the word used in the contract is that we ‘furnish’ the fish to the plaintiff.

The COURT. Well, I will substitute the word ‘furnish.’ The word ‘furnish’ however, means ‘delivered.’ My interpretation of the contract would be that the fish must be delivered at the cannery in such a way as was stipulated and in accordance with the terms of the contract.

Mr. THORNTON. And, if your Honor please, the contract says that the plaintiff will receive the fish at the dock.

Mr. GREGORY. It does not say on the dock, it says the defendant shall furnish the plaintiff with the fish.

The COURT. The word ‘furnish’ means delivered, that is, in accordance with the terms of the contract.” (pp. 194-195.)

This instruction becomes of importance when it is borne in mind that the testimony shows that 31,698 fish were thrown from the lighters which were alongside the fish dock of the cannery; that they were not placed in the fish bins because they were already full.

Under this instruction it would seem that before defendant could claim that plaintiff had failed to carry out his contract, although furnished with fish, it was necessary for the defendant to have actually *delivered into the fish bins* these fish. It is our claim that if there was already fish in the fish bins, and the defendant had brought the fish to the dock in lighters or scows, and had then thrown them away, it had complied with its contract to "furnish" these fish so far as the contractor was concerned. In other words, that it was not necessary that the defendant unload the fish into the fish bins and then throw them overboard, if it was apparent that they could not be used by the contractor.

The instruction given placed this matter squarely before the jury. It is our claim that the word "furnish" as used in the contract is not synonymous with the word "deliver".

The words "deliver" or "delivery" do not appear in this contract, and there is no affirmative statement by the owner that it will furnish the fish at any particular place. There is only the negative obligation which flows from the statement:

"The party of the first part agrees to receive the fish on the wharf at Nugashak, to clean and prepare them in the fish-house for canning (it being understood that the scales are to be removed from the fish), and transport them to the cannery."

The particular clause of the contract however which the court was considering in giving these instructions is the following:

“And it is expressly understood that the party of the first part is to put up not less than twenty-seven hundred (2700) cases of fish per working day, provided they are furnished with the necessary fish for that purpose, by the party of the second part. In default thereof they agree to forfeit to the party of the second part one (\$1.00) per case.”

The word “deliver” is a technical one, generally used as a condition precedent to the passing of title to a chattel. The word “furnish” is a broader term, and one may have complied with his obligation to furnish fish, although he has not technically delivered them. The defendant would have complied with its obligation to furnish these fish if at all times it was ready, able and willing to furnish the contractor with such fish *as needed by him*.

As noted, the language of the contract is “provided they are furnished with the *necessary* fish “for that purpose”. It would seem that the defendant fully complied with this obligation if it had at all times in its fish bins a surplus of fish, however small that surplus might be, and had in reserve in its scows or lighters sufficient to replenish the bins when emptied.

It has been held that a subcontractor whose contract provides that he shall be paid for “labor done and materials furnished” is entitled to recover for materials prepared, but not delivered.

Dickinson v. Gray, 8 S. W. Rep., p. 880.

in which the court said:

“The word ‘furnish’ in the contract is not to be held as equivalent to ‘delivery’.”

In Tibbetts v. Moore, 23 Cal. 208, it was said at page 214:

“The question is whether or not the word ‘furnish’ as used in the contract means delivery at the building in the construction of which the materials are furnished. We think that such is not its reasonable construction.”

“The material man is properly said to have furnished the materials when he has delivered or has them ready for delivery at the place where he has agreed to deliver them under the contract.”

We think that the instruction given as explained by the statement of the trial court to the effect that “the word furnish means delivered” placed before the jury the necessary conclusion that it was necessary for the defendant, in order to comply with the terms of its contract, to have at all times in its fish bins fish sufficient to pack 2700 cases, although plaintiff was unable to handle the fish that were actually in the bins. It is as if an owner had entered into a contract for the building of a house, he to “furnish” the necessary lumber. It is submitted that the owner fully complies with his contract if he at all times keeps the contractor supplied with the quantity of lumber that he needs; it is not necessary as a condition precedent to any recovery that he may be entitled to against the contractor, to show that he has delivered *all* the lumber.

The instruction given, if "delivery" and "furnish" were said to be synonymous, should have also stated that the fish were furnished by the company if it had them delivered or *ready for delivery*. In this connection it is submitted that the instruction requested by defendant on this subject correctly states the law (pp. 212-213):

"In connection with the fish supplied by the defendant to the plaintiff at the former's cannery, I charge you that the evidence shows that after a heavy run of fish commencing on July first had continued for several days, the superintendent of the cannery limited his fishermen so that they would bring into the cannery a less number of fish than they otherwise would have done.

"I charge you that even should you believe that the defendant did not actually produce at the cannery each day sufficient fish to have canned 2700 cases on each day, but nevertheless if you believe from all the facts in evidence here that defendant would have produced sufficient fish to have so canned 2700 cases each day, except only for the limit so as aforesaid placed upon its fishermen, and if you believe furthermore that the defendant at all times during this period had on hand at its cannery ready for delivery to plaintiff's men more fish than plaintiff actually canned, then I charge you that the defendant has complied fully with the obligations imposed upon it by its contract so far as furnishing fish is concerned."

No specific exception was taken to the refusal to give the foregoing instruction, although such exception is noted in the assignment of errors, but it is submitted that it should have been incorporated in

the instruction as given, and that the instruction which was given and excepted to is faulty because it is not a full statement of the law. The charge should contain (Sec. 608, Cal. Code of Civil Procedure) :

“In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict.”

The omission to include in the charge one of the essential elements of the subject-matter makes the charge as erroneous as if what was stated is wrong.

We have endeavored to show that the uncontradicted testimony is that large quantities of fish were thrown away from the lighters because plaintiff's men were unable to handle the fish that were furnished them, and even then they materially failed to can 2700 cases per day. No damages whatever have been allowed by the jury for these fish thrown away, or for the money which defendant paid its fishermen by reason of the limits, and which limits were placed solely because the Chinese crew could not handle the fish.

The jury we submit must have been led to believe that they could not consider these fish so thrown away or the loss occasioned by limiting the fishermen, because forsooth the fish were not “delivered” into the bins.

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT THEY MAY TAKE INTO CONSIDERATION THE USUAL LOSS RESULTING FROM SPOILED CANS THAT OCCURS IN OPERATIONS OF THE KIND IN QUESTION.

This instruction was as follows:

“As I have suggested, the plaintiff is required, in order to recover upon his contract, to show that he has performed the stipulations of that contract on his part. Now, he has performed that contract if he has done the work called for with the skill, diligence and efficiency usually obtaining in such work. There has been evidence put before you here as to that class of work and what was the usual result is in putting up a large pack of fish, as to the number of cans or cases in a given number that will usually be spoiled or destroyed through one cause or another. You have a right to take that evidence into consideration and determine whether the loss of fish which has been testified to here, that is, I mean the loss in spoiled cans, was any more than the usual loss that occurs in operations of that kind. If there were not, then the plaintiff has performed the contract as it is contemplated by the law he should have performed it—with due diligence; although not such as to absolutely preclude any loss of fish through faulty work, nevertheless in such a way that has avoided a loss which is unusual or beyond that which is ordinarily experienced in such work.”

The contract between the parties provided as follows:

“All swelled cans, in excess of four (4) cans per hundred (100), all light cans, all cans collapsed, burst or deficient in seams (where any

of said faults or defects are the result of want of skill of the party of the first part), are to be paid for by the said party of the first part at the rate of six (6) cents per can.”

The instruction given conflicts with the contract in that the jury were told that they might take into consideration the usual number of cans that were spoiled or destroyed in the canning operations, while the contract provides for that inevitable loss by relieving the contractor *to the extent of four cans per hundred*. The contract therefore has definitely provided for this ordinary loss, wear and tear. If this was less than four cans per hundred, plaintiff was not responsible, and if more he was responsible. The jury by the instruction necessarily took into consideration not the arbitrary standard fixed by the contract, but the “usual” amount of cans destroyed or spoiled.

V.

ERRORS IN THE ADMISSION AND EXCLUSION OF EVIDENCE.

1. The court erred in permitting the sales account of defendant for the year 1910 to be admitted in evidence (pp. 89-92). The materiality of this evidence does not appear. It is the account of sales made by the defendant company and shipments to San Francisco and England. There is nothing to connect it with the fish caught at the defendant's cannery during the year 1910 or with the number of cases which were packed by plaintiff contractor.

2. We urge also that the court erred in overruling the motion of defendant to strike out the answer given by the witness Kep Yung concerning the character and the efficiency of the machinery of the defendant company (p. 81).

The same objection was made to many other questions asked the same witness concerning the machinery (pp. 84-88). It is true that this evidence was subsequently eliminated by the trial court of its own motion. Its introduction however placed the defendant below in the unfortunate position of having had very considerable testimony given concerning the inefficiency of its machinery and then this same evidence being struck out before defendant had completed its showing on that subject; in other words, there was placed before the jury evidence to the effect that the Chinese crew were unable to can the requisite number of fish per day on account of alleged defective machinery, and these defects were described in detail. This evidence of course was highly detrimental to defendant and must have largely controlled the jury in their verdict.

3. The court erred in sustaining an objection to a question asked by defendant of its witness McGregor concerning the market price of Alaska red salmon in the year 1910 (Defendant's Exception No. 8, p. 165).

This question concerned the loss sustained by defendant by reason of the cases of salmon which were left at the cannery by the Chinese crew. The num-

ber of the cases so left was a matter of dispute, the defendant's witnesses stating that they counted them and that there were about 2045; the plaintiff's witnesses stating on the other hand that there were about four or five hundred (p. 168). The number of the cases so left is immaterial. Defendant in its counter-claim (p. 60) had alleged as one of the elements of its damages on account of the contractor not complying with his contract, that 2045 cases had been improperly packed and the leaks in which were not mended, so that they spoiled; that this salmon if properly put up and canned had a standard price in the open market of \$5.40 per case; that the actual cost of packing was \$3.49 per case and that a profit would have been realized thereon of \$3905.95; that by reason of the salmon having spoiled defendant had been damaged in the sum of \$11,043, which included the actual cost of canning the salmon and the price which would have been realized from the sales if the salmon had been properly packed.

The question asked the witness McGregor and the objection to which was sustained was directed toward this cause of counter-claim and was a necessary element of defendant's proof in showing defendant's damage. This was made clear by the offer which defendant then made (p. 165), that offer being to show the market value of the salmon at that time and at the nearest market, as well as the cost of procuring the fish and canning and marketing the salmon and other details which are fully

set forth in the offer of proof. This offer was declined and we urge that this also was error.

We assume that the ruling of the trial court was based upon the clause of the contract which provided that if all the leaks were not so mended daily the contractor would pay \$3.00 per case.

The contract contains not only this, but other provisions for liquidated damages, e. g., if the contractor failed to put up 2700 cases per day he agreed to pay \$1.00 per case (p. 20), and also, the contractor agreed (p. 19) to forfeit to the company \$14,000 for the failure to carry out the contract in the manner provided.

The subject-matter with which the court was immediately concerned when it made this ruling was some hundreds of cases of salmon that had already been canned and were then in the company's warehouse at Nugashak. There could have been no difficulty in determining the actual damage caused by the contractor's refusal or inability to complete the packing of these cases, because the salmon had an established market price and the cost of process was accurately known. To determine this actual damage was the purpose of the question and if the provision as to the penalty of \$3.00 per case is invalid, then the evidence would seem not only proper but necessary in order that defendant prove its counter-claim on this subject.

To invoke and hold valid these provisions for liquidated damages is to provide plaintiff with a

two-edged sword, for if the contract is valid when it states that the contractor will pay \$3.00 per case for unmeddled cans, it must also be valid when it states that he will pay \$1.00 per case for the fish which he fails to put up. As noted already, there is the uncontradicted fact here that the contractor never put up 2700 cases per day, except on one occasion, when he was assisted by outside help. There therefore must have inevitably resulted, if this penal clause is valid, some damage to the company.

Section 1670 of the California Civil Code provides:

“Every contract by which the amount of damage is to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.”

Section 1671 of the same code provides:

“The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.”

We have endeavored to show that there was nothing in the nature of the case immediately under consideration which made it either impracticable or extremely difficult to fix the actual damage that would have been suffered by the defendant on account of the failure of the plaintiff to complete his pack. Indeed the provision as to the \$3.00 per case

for unmended cans does not state, as does the provision for the \$14,000 penalty, that the damages were so fixed "as from the nature of the case it will be impracticable to fix the actual damage".

4. It is submitted that the court erred also in overruling an objection to a question asked by defendant of its witness Berglund, called in surrebuttal (p. 178) concerning the number of piles of cases of salmon that were left at the cannery when the ship sailed on its homeward voyage.

It has been noted that the quantity of this salmon so left had been variously estimated, the only witness for plaintiff on his case in chief on this subject stating that about six or seven hundred cases were left at the cannery (p. 83). Defendant's witnesses Berglund, Young and Johansen stating that there were over two thousand cases so left.

When the plaintiff reached his rebuttal he called witnesses on this subject. Yee Chat testified that there were about four or five hundred cases left in a pile, and "the whole pile was about that much", and he was then asked (pp. 169-170):

"Q. Were there more than one pile of these damaged cans?

A. One pile.

Q. All in one pile, were they?

A. Yes, when we left for San Francisco."

The witness Gray, also called for plaintiff in rebuttal (p. 170) said that he saw some cans left at the cannery, but could not say that he saw them all,

as he did not take a special look through the can-
nery and warehouse, but just walked through. He
then said that the pile he saw was probably six feet
wide and fifteen feet long and that this pile was in
the warehouse and that he saw another small pile
a little above and opposite the one he had men-
tioned.

The witness Barling was then recalled by plaintiff
in rebuttal (p. 179) and was allowed to state that
there would be 275 cases in a pile six feet wide by
fifteen feet long and four feet high, and that in
three piles of the same size there would be about
850 cases.

The testimony to which we now direct the court's
attention was in direct response to the testimony of
the witness Gray, who as noted had testified that he
had seen two piles in the warehouse. The defend-
ant now sought to show that there were other piles,
not in the warehouse, which were not seen by Gray,
and it was for this purpose that the question now
considered, viz.: where were these piles, was asked
the witness Berglund. The ground of the objec-
tion, viz.: that it was not rebuttal testimony, is, we
submit, obviously incorrect, because it could not
have been of any importance on defendant's case
in chief and only became important after plaintiff's
witness had been allowed to state that he had seen
two piles of cases in the warehouse. Taking the
testimony of the witnesses Gray and Berglund to-
gether, the jury were confined to a consideration of
the number of cases that would have been contained
in a pile six feet wide and fifteen feet long. We

submit that it was clearly within the right of the defendant to prove if it could that there were other piles, of different dimensions, outside the warehouse. Counsel for defendant at the time made the following statement after the court had stated that he would not permit such question upon the ground that it was not rebuttal:

“When we put in our case we said there were a certain number of cans, 2045 cases in all, which were left there. When they come forward in their case they produce a witness who states he does not know how many cans there were but that he saw one pile, giving it as 6 feet wide and 15 feet long, and then he saw another pile about half that size. I now desire, for the first time, to ask this witness how many piles there were.

(The court thereupon stated that he would not allow defendant so to do, as it was not rebuttal testimony.)

(And an exception to the court's rulings upon the question of the right of defendant to examine the witness concerning the location and number of these piles was allowed the defendant.)

(Defendant's Exception No. 12.)”

VI.

IT CANNOT BE URGED THAT THE FAILURE TO GRANT THE MOTION FOR NONSUIT TO THE FIRST CAUSE OF ACTION IS IMMATERIAL ERROR BECAUSE NON CONSTAT THE VERDICT MAY HAVE BEEN GIVEN UPON THE THIRD CAUSE OF ACTION.

This third cause of action was for work and labor done, and the number of cases packed was 44,000.

This, at the contract price of 55 cents per case (all these cans being filled with the Jensen can filling machine) would be \$24,200. An advance payment of \$14,000 and a credit of \$1283.30 is admitted in the complaint, so that the highest verdict that could have been given under the second and third counts would have been,

For 44,000 cases,	\$24,200.00
For nailing shooks,	1,671.40
	<hr/>
Total,	\$25,871.40
from which must be subtracted,	15,283.30
	<hr/>

leaving the maximum difference which
can be obtained upon quantum meruit \$10,588.10

This verdict therefore for \$20,182.10 cannot be based upon any implied cause of action, but must be upon the contract, and particularly upon defendant's guaranty in that contract.

VII.

CONCLUSION.

Although realizing that we are subject to the charge of useless repetition, we venture to summarize the record in this case. If these facts presented any conflict whatever we would not again refer to them, but since they are without contradiction it is our understanding that they may properly be now considered by this court.

1. From the 1st to the 14th of July there was always a surplus of fish in the bins of the defendant at its cannery. The contrary is not asserted by anyone.

2. That 31,698 fish were thrown away on the 8th and 9th of July from the scow tied to the dock of the cannery and that these fish were thrown away because the Chinese crew were not able to take the fish rapidly enough from the bins and they therefore would spoil; that these fish so thrown away were "furnished" under the terms of the contract. There is no claim that these fish were not thrown away, and they alone would have filled over 2500 cases of salmon.

3. The defendant paid \$2023.00 to fishermen for fish which were not caught on account of the inability of the Chinese crew to handle the fish already caught; there is no dispute on this point. Defendant was entitled not only to this money so paid the fishermen, but also to the profits which it would have realized if they had been caught. That this loss of probable profits is a proper element of damages was directly held in the parallel case of *Pacific Steam Whaling Co. v. Alaska Packers Association*, 138 Cal. 632, in which the court said:

"The waters in question here constituted a special salmon fishery,—where those fishes were to be found in great abundance,—and the proposition that damages evidently suffered by plaintiff from the wrongful act of the defendant by which plaintiff was excluded from exer-

cising the clearly valuable right of fishing in those waters are entirely beyond legal proof, cannot be maintained.”

4. The plaintiff by his contract took upon himself the full obligation of packing 2700 cases per day, when furnished with the necessary fish. He failed to pack this number by 6376 cases between July 1st and July 14th. This was a substantial breach of his contract, which must prevent him from recovering thereon without a showing of a proper excuse and he cannot offer any excuse under his pleading.

5. A considerable number of cases were left at the cannery. This is admitted by all the witnesses. It is immaterial whether it was 500 or 2000. These cans were leaky, and under his contract the contractor was obliged to mend them *daily*. Admittedly he did not do so, because on July 31st, some 16 days after the heavy run had ceased, this great number of leaky cans were still unmended. It is no defense to this claim to say that the men were called away to go to San Francisco. It certainly was not incumbent upon the defendant to keep its ship, with the resultant loss, indefinitely at its cannery, and in this respect the importance of mending the leaks *each day* is shown. When it is considered that this entire pack was only 44,000 cases and that from 500 to 2000 cases were left at the cannery, it would seem that it was at least incumbent upon the plaintiff to show as a condition precedent to his

recovery on this contract some excuse for not complying with the obligation of his contract to "pile, label, put in cases and nail up the entire pack of the season", and "that all leaks shall be mended by skilled labor daily".

The verdict in this case has given to the plaintiff damages upon the following calculation:

(a) It has awarded him 55 cents per case for cases which would have been filled by 31,698 salmon that were thrown away, because plaintiff could not handle them in accordance with his contract.

(b) It has allowed him 55 cents per case for cases that would have been filled by 36,600 fish that were paid for but not caught solely because plaintiff could not handle the fish that were furnished him.

(c) It has allowed him 55 cents per case as if he had fully packed 2700 cases per day from July 1st to July 14th, although the uncontradicted evidence shows that he fell 6376 cases short of this amount in this period. That is, the contractor is allowed his full compensation for work that he did not do, and the owner is not allowed any damages for this failure.

(d) It has allowed plaintiff 55 cents per case for a large number of cases left at the cannery, the exact number of which is immaterial, the packing of which was never completed and upon which the contractor could not have done all the work that the contract required him to do thereon.

It is therefore submitted that since plaintiff stands upon the strict letter of his contract there is no evidence whatever to support the first cause of action set out in his complaint, and that the cause should be remanded for a new trial.

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